Révision de la législation sur l'immigration

Immigration Legislative Review

Not just numbers

A Canadian Framework for Future Immigration

Canada

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Montreal, December 31, 1997

The Honourable Lucienne Robillard, M.P., P.C.
Minister of Citizenship and Immigration
365 Laurier Avenue West
Jean Edmonds Tower South, 21st Floor
Ottawa, Ontario
K1A 1L1

Dear Minister:

My colleagues, Susan Davis and Roslyn Kunin, and I have the pleasure of submitting to you our report entitled *Not Just Numbers: A Canadian Framework for Future Immigration.* This report looks at both the legislation and the policies that relate to immigration and the protection of persons.

We wish to thank you for the confidence you have placed in us. Our consultations have also shown us that the public still has confidence in the immigration and protection programs, and that more and more people have an interest in these questions.

We hope that our recommendations will assist in improving these programs.

Sincerely,

Robert Trempe
Chair

Enclosure

Advisory Group/Groupe consultatif
300 Slater Street, Jean Edmonds Tower North, 6th Floor, Section A/
Tour Jean Edmonds nord, 300, rue Slater, 6e étage, Section A
Ottawa, Ontario K1A 1L1
Tel.: (613) 957-8784
Fax: (613) 946-0581

Biographical Notes

Susan Davis has been a consultant to the Department of Citizenship and Immigration since 1995 under the Interchange Canada program. Prior to that, she was the National Executive Director of Jewish Immigrant Aid Services of Canada. While there, she was a member of the Ministerial Advisory Committee on Appointments to the Immigration and Refugee Board. From 1983 to 1988, she served as a member of the Refugee Status Advisory Committee. Ms. Davis has also worked as a Program Officer and a Protection Officer with the United Nations High Commissioner for Refugees from 1979 to 1983.

Dr. Roslyn Kunin is Executive Director of the Laurier Institution Inc. and President of Roslyn Kunin & Associates Inc., an economic consulting firm. From 1973 to 1993, she worked as a Regional Economist with the former Employment and Immigration Canada. She has been Visiting Assistant Professor at the University of British Columbia and Simon Fraser University, and has published several papers on business immigration issues.

Robert Trempe recently retired as Assistant Deputy Minister of the Quebec Ministère des Relations avec les citoyens et de l'Immigration. He was formerly Assistant Secretary for Budgetary Policy for the Conseil du Trésor du Québec, and has been Deputy Minister for Linguistic Policy and Assistant Deputy Minister for the Ministère de l'Éducation.

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We wish to thank everyone who took the time to meet with us or write to us.

We thank the employees of Citizenship and Immigration Canada who, in various ways, made our work easier, while preserving the independence of the members of our group.

In particular, we wish to extend a warm thank you to the members of the secretariat whose services were made available to us by the department. Without their enthusiasm, dedication and remarkable team spirit, this report would never have been completed. Their names are included in an annex to the report, along with the names of people in Vancouver, Toronto, Montreal and Ottawa who also lent us invaluable support.

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Introduction

This report may appear to be the work of only three individuals. In fact, it has been made possible by the hundreds of Canadians who, in 1994, took part in a consultation on new directions for immigration beyond the year 2000, and by those who met and spoke with us, or sent submissions to us, over the past year. Their observations and suggestions covered every aspect of the immigration legislation and policies, as well as the practices of the department, reflecting the public's increasing interest in immigration matters.

We therefore believe the report we are submitting is in keeping with the very broad mandate entrusted to us, encompassing not only the legislation but also its policies and programs. Indeed, our fear is that we may have fallen short of addressing all the issues brought to our attention. Our efforts were hampered by the short time allotted to us, and even more so by the lack of relevant data. It should not come as a surprise that in our report, we make a number of recommendations stressing the need for research, and for sharing and using such research in the management of immigration programs. We have no doubt that we are expressing the views of many Canadians in that regard. In addition, many issues brought to our attention were beyond the scope of our mandate.

The reader should also not be surprised by the differing levels of detail in the treatment of the issues we considered. We found it necessary to describe in detail the mechanisms we propose in the areas of protection, compliance, and reviews. As a consequence, the language became more technical, because it seemed to be the only way we could provide a clear view of our approach to these complex problems.

The first matter we considered was the type of legislation we should recommend. Many of those consulted pointed to countless difficulties encountered in interpreting the current legislation because of its complexity. They urged us to propose a simpler Act, one that would state Canada's objectives and obligations, and the key elements for an effective program. Of paramount concern was that the legislation should not allow for any form of discrimination in the design and implementation of immigration programs. This is what we propose. Beyond that, the government has a responsibility to make regulations that accurately reflect the objectives of the Act, and to provide the same information to the public as that used by the staff of the department. In this way, the power to make regulations is balanced by corresponding obligations that will allow the democratic process to work effectively.

We are proposing two separate pieces of legislation — one on Immigration and Citizenship and one on Protection. We will expand further in the report on our reasons for making this recommendation, but it is quite obvious that the provisions dealing with immigration in the current Act sit uncomfortably with those intended for persons in need of protection. While it is true that the two areas of legislation are not mutually exclusive, it seems to us that two separate Acts, each providing an undivided focus, would be both more functional and more productive. We also propose that the necessary links should be made between the protection program and those programs relating to immigration and citizenship matters.

Citizenship issues are not explored in depth in the following pages. However, we broach the subject in the chapter on integration which, in our opinion, is at the very core of immigration.

We devoted a good half of the time at our disposal to consultation, not to mention the time spent reading hundreds of briefs, letters and other documents provided to us. Most of the representations we

received condemned the serious lack of cohesion in the current Act, the discrepancy between certain practices and the objectives of the Act, and what appears to be the government's inability to ensure the "integrity of the system" in its broadest sense. We were told not only about the government's inability to follow through on removing individuals deemed undesirable or denied refugee status, but also about refugees abandoned to their fate in foreign lands, and about the slow processing of sponsorship applications and job validations. In other words, system integrity should not be interpreted simplistically to mean restriction of access to Canada and the direction of our energies and resources to removals.

This, in any case, is not our position. This is not to say that major reforms are not needed in some areas of our immigration system and in the way we identify refugees. We will deal with the changes we deem to be necessary in the body of the report.

Our approach was to identify the core values shared by Canadians, and thereby the objectives our immigration policy ought to pursue, and to measure our recommendations against this grid of core values.

This is a perilous exercise, and one bound not to receive universal approval, to be sure. But we are strongly supported in our position by the majority of those Canadians who expressed themselves in the 1994 consultations, by those we met during our consultations, and by the majority of the written briefs we received. Our position is therefore equally as far from the position of those who believe Canada should withdraw from the Geneva Convention as it is from the position of those who liken Canada to totalitarian countries merely because our government takes those steps necessary to confirm the identity of persons entering our territory.

The report we submit suggests neither opening our borders wide nor shutting them tight. Rather, it focuses on the fundamental goals of immigration and protection in Canada, and seeks to translate them into well-managed programs.

Section 3 of the current Act describes its objectives. Heading the list is a demographic objective. But Canada has no demographic policy for us to consider. Levels of immigration — on which the Minister is bound by law to seek advice — are found by some to be an intriguing topic. It seems to us, however, that the real question that needs to be asked in this regard is what, if any, relation immigration levels have to the resources available for integration and effective program management. Another question should be whether the effect of the arrival of immigrants changes a community to the point of inhibiting the integration process. Beyond the numbers are people, who choose our country and will eventually become our fellow citizens, perhaps our neighbours. It is with integration in mind that we identified the Objectives of the two Acts we recommend and the Means through which to achieve those Objectives.

To understand better many of the issues raised by the public, it is important to be aware that, beyond the Objectives of the Act, the management of immigration programs rests on a number of assumptions which we liken to myths. The first and most stubborn myth, which explains much of the criticism directed at the Act, is that Canada is protected by impenetrable borders, which we can open or close at will. When the border is too porous, we should simply assign more resources to remove foreigners who have been ordered removed. This is part of the solution, but we will see that the matter is not that simple.

The myth of border invulnerability feeds on another, just as deep-rooted, which suggests that hordes of foreigners are on their way to Canada. Of course, the overseas visa officer who receives applications from 17 members of the same family, or the province that yearly deals with 11,000 refugee claimants, might be excused for developing such a mentality. The concentration of immigrants in Montreal, Toronto and Vancouver might also give the impression to the inhabitants of these three cities that the entire world has landed on Canada's doorstep. But these exceptions aside, does anyone truly believe that

Canada is threatened with invasion? The truth is that Canada is competing with other industrialized countries to attract the best human capital, that we are not always on the winning side of this competition, and that something needs to be done to change that.

Another myth is that the category inscribed in the entry visa freezes the bearer's situation forever. Not only do people change, but the circumstances that brought them to Canada can also change. Conditions of residence (permanent or temporary), reasons for admission (refuge and protection), family situation, profession or trade — all are subject to change. Intentions may also change. We have to draw the lessons from what is obvious throughout the world: change — individual, political or economic — is a predominant feature of our times, and will probably remain so for generations to come. However, within the framework of the current *Immigration Act* and its regulations, any change poses a problem.

In our report, we attempt to dispel these myths and adjust our immigration system to the new realities.

In addition to the objectives, the current Act includes three main parts: the selection of immigrants, the protection of our borders, and the removal of persons who do not meet the requirements for being in Canada. There is virtually no mention of integration. Even though recent decisions have compelled provinces to discharge their responsibilities in the area of integration, the Government of Canada has an enduring role to play in this regard since there needs to be a direct link between the selection of immigrants and their ability to integrate. Canada has a duty to ensure that the provinces have the resources necessary to integrate newcomers since the success of immigration really lies in the integration of immigrants to Canadian society. Not surprisingly then, our report contains recommendations dealing with integration and the role of the Government of Canada in this area.

This brings us to another set of recommendations which seem to us to be fundamental. These relate to the sharing of responsibilities in matters of immigration, not so much in relation to the Constitution, but from the practical standpoint of information exchange and participation in decisions. Provinces, municipalities, and local organizations such as school boards are in the front line of changes brought about by the immigration decisions made by the Government of Canada. Flaws in the selection system, outmoded regulations and questionable procedures have a direct bearing on integration. It is therefore necessary to review in depth the consultation practices that all partners agree are unsatisfactory.

A mechanism needs to be devised which reflects the dynamics of relations among Ottawa, the provinces, municipalities and community groups so that the muddled landscape of administrative responsibilities in immigration can be cleared. Each party must do its share, without trying to monopolize either the discourse or the newcomers.

While it is easy to tally the numbers of immigrants we select or those we expel, it is more difficult to know how those who settle in our country manage to integrate and take part in our collective life. Our report mentions some areas of concern in this regard, but mostly it urges the department to go beyond mere statistics. Canadians, who take an increasing interest in immigration matters, need to be able to know whether program objectives are met, and this is not merely a question of accounting. The department has a duty to provide, through whatever means the Minister deems appropriate, all the information required not only by the provinces, which share immigration responsibilities with Ottawa, but also by municipalities and organizations discharging functions related to immigration programs. This is a condition we deem essential to the smooth operation of programs. It also seems to us of the utmost importance that the Canadian public be provided with effective indicators of the performance of the various immigration programs. Our immigration policy can only stand to gain if it is better understood, and the government could find useful allies in achieving its goals.

Some of the people we met would like to see a national debate on immigration. Similar views were expressed during the 1994 consultations. Those people who expressed such a view indicated that they would aim to take advantage of such a debate by emphasizing the benefits of immigration. Some even indicated an intention to express the need for Canada to pursue an open-door policy. We believe that national debates are fruitful, provided they are well supported by comprehensive and publicly available information. This block of information needs to be created before a debate can take place.

One last observation: a report like ours is not without a certain dose of naiveté, for which we do not apologize. Without it, we would not dare take the liberty of making substantive recommendations. One of the flaws in Canadian politics — and on this, we greatly differ from our southern neighbours — is the difficulty in dealing with subjects such as immigration, as if to raise the issue itself were tantamount to questioning its benefits, the place of immigrants, or the value of a certain category of immigrants. This kind of unspoken censorship has been a chronic problem for both journalists and politicians. We firmly believe that the government must account for the way the objectives of immigration programs are being met. This is in accordance with the rules that allow the true exercise of the democratic rights of Canada's citizens. Only then can we restore the public's faith in the management of immigration programs. At the same time, we will restore the confidence of those who implement these programs and, in the end, of all those who elect to settle in Canada.

Chapter 1

Concepts, Values and Trends: Starting Points for Review

1.1 Introduction

In developing recommendations for change to the *Immigration Act*, it is critical to identify the dominant national and international trends affecting immigration, and to reconcile these trends with the fundamental values of Canadians and the major principles they demand for the design and operation of public programs. Part of this process of review and reform is the reassessment of numerous assumptions that have crept into the national consciousness — assumptions that may distort public discussion, and misdirect public policy and program decisions.

The most challenging analytical problem is to establish to what degree trends (dynamic in nature) influence core values and principles (static by definition), or conversely, to what extent core values and principles are powerful enough to resist or even reverse what appear to be the likely impacts of national and international trends.

Inevitably, there is a "push" and a "pull" between these two forces, making the determination of causality a difficult and seemingly endless process. To avoid this trap, we will proceed from what we believe we know (core values and principles), to what we believe will be the major factors influencing change (national and international trends).

1.2 Core Values and Principles

Canadians generally hold deeply rooted values that reflect our basic morality and sense of fairness, and that define us as a nation. For Canadians, much of what can be considered to be our unique value base is found in the *Canadian Charter of Rights and Freedoms*.

Language is also a defining value of Canada; some rudimentary knowledge of at least one of the official languages is seen as necessary for integration into Canadian society.

While it is difficult (if not impossible) to determine a precise set of values that all Canadians hold, recent work by the Family Network of the Canadian Policy Research Networks (Suzanne Peters, Director) has described one set of recurring Canadian values. The study was based on a scan of numerous national opinion polls taken over the past 15 years, as well as input from 25 extended discussion groups in eight Canadian cities, comprised of both randomly selected participants and selected recipients of various family services.[1]

These values are:

Self-reliance: The belief that individual effort is ideal and necessary in a free and democratic society.

Compassion leading to collective responsibility: A direct role for the government as well as voluntary action to alleviate economic disparities caused by both market and individual inadequacies.

Investment (particularly in children as the future generation): Although there is some disagreement on the boundary between the role of private families and public institutions, there is a deeply held belief that there is significant value in dedicating resources to the future, as represented by children.

Democracy: Unwavering support for democratic rights and freedoms, as well as the importance and value of the state, tempered by less than enthusiastic support for the current political system.

Freedom: Including the freedom to express the collective will for specific programs such as universal health care, accessible education, and an adequate social safety net.

Equality: Including equality of opportunity for all Canadians.

Fiscal responsibility: Respect for program affordability within fair and reasonable limits.

1 Suzanne Peters, *Exploring Canadian Values: Foundations for Well-Being* (Ottawa: Canadian Policy Research Networks, 1995), 5 and 69-71.

The Supreme Court of Canada has also given some guidance with respect to Canadian values:

> Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society ... to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.[2]

Essentially, we are a law-abiding society, conscious of both individual and collective rights and responsibilities. We value personal honesty and integrity as well as respect for formal and informal institutions and other forms of authority. As an outward-looking country, we project our national values onto our international actions, applying a universal standard to our international memberships, treaties and other obligations. We also expect these same values from those who come to our country.

These values have guided our thoughts as we formulated this report.

1.3 Influence of Values on Program Design and Operation

Some of these values may need more direct expression. For example, non-discrimination is one of the objectives of the present Act. The *Canadian Charter of Rights and Freedoms* has come into effect making this a condition of every aspect of our society. Hence, rather than merely expressing this principle in legislation, it must become integral to the program and policies as well.

One particular area is the equality of the sexes. Any new legislation must be sensitive to gender. This can be accomplished by a technique called "gender mapping" which assesses the practical impact of proposed legislation, policies and programs on gender.

Values can provide the direction for decision makers in the design and implementation of public programs. For example, the willingness to invest suggests a proactive preventive approach to programming rather than a remedial approach. The compassion value demands that programs be adequate to meet basic needs through minimum standards. The equality value and Canadians' inherent sense of fairness require that every citizen be given equality of opportunity to achieve equitable outcomes. Finally, the value of fiscal responsibility to Canadians requires that public decisions recognize limits on the system, such as levels of taxation and the form and size of transfer arrangements.

The Peters study describes seven value-based principles for program design and operation.[3] From the views that we heard at our consultations and in submissions, we have adapted these principles for immigration programs:

Integration: Linked social and economic policies providing long-term solutions.

Accessibility: Program support through universal access to opportunity rather than through inherent entitlement.

Comprehensiveness: A continuum of programs and services rather than a piecemeal approach.

Fairness and consistency: Clear expectations and limitations, delivered in a predictable and respectful manner by unbiased staff or service-providing agencies.

Responsiveness: Customization of programs and services to individual needs.

Accountability: Well-regulated and monitored programs and services, with clear rules and transparent review.

Democratization: Greater inclusion of citizens in the policy process, and partnerships to deliver services.

These values and principles should guide both the development of new legislation and the design of the systems that will provide the programs and services

2 *R.* v. *Oakes* [1986] 1 S.C.R. 103.

3 Suzanne Peters, *Exploring Canadian Values: Foundations for Well-Being* (Ottawa: Canadian Policy Research Networks, 1995), 74.

to Canadians. One immediate impact would be a concentration on *people* rather than *numbers*. Hence the title of our report.

1.4 International Trends

Of all the emerging trends, none is more dominant than what is loosely called globalization. Globalization is a code word for the breakdown of traditional boundaries among sovereign nations, economic markets and individuals. It challenges the influence of national borders and laws, breaks down artificial barriers in the market place, and extends the abilities of individuals to communicate, acquire knowledge, compare options and make choices.

Globalization creates natural tensions that impact on immigration policy. We have identified and been influenced by several important trends:

- the freer movement of people and goods between countries and regions;
- changes in migration patterns;
- the influx of people from rural to urban settings;
- a growing middle class in developing countries seeking a better quality of life; and
- rapid advances in communications technology and access to information.

These economic, social and technological trends bring with them a number of negative consequences which must be addressed:

- international crime (people smuggling, money laundering, drug trafficking, terror, organized crime);
- the spread of contagious diseases;
- the development of a fortress mentality in immigrant-attracting countries; and
- increasing numbers of displaced and persecuted persons seeking asylum.

In addition, governments and decision makers at all levels must respond to:

- growing international competitiveness for both outputs (products and services) and inputs (labour, capital, technology, entrepreneurial skills); and
- increased fiscal constraints.

1.5 National Trends

In a global environment, there is some debate about where international trends cease and national trends begin. Although it is difficult to compartmentalize them into neat little boxes, we can identify those trends which influenced us in this report:

(i) Economic Trends

- "tax fatigue," deficits and debt have imposed severe fiscal constraints on governments;
- increased demand for skilled workers, especially for the "knowledge industries," and the loss of skills to other countries have illuminated the shortage of high-skilled workers in Canada;
- a rapid decline in the number of unskilled jobs;
- acute demand for highly developed individual skills has broken down the traditional belief that labour is homogenous;
- time lags for training have exacerbated labour shortages for high-skill jobs;
- substantial cost of bringing in temporary workers;
- persistence of medium/high levels of long-term unemployment;
- foreign trade as a prime engine of economic growth;
- free or "freer" trade, internationally and domestically;
- shorter work assignments, necessitating a more "contingent" workforce;
- increased shortage of entrepreneurship;
- a move to self-sufficiency and self-employment;
- growing economic insecurity; and
- transitional and structural poverty.

(ii) Demographic and Social Factors

Canada does not have an explicit population policy. As a country, we have instead articulated a set of policies, programs and legislation concerning employment, immigration, health, income security and social welfare. Without immigration and a rising birth rate, the size of the Canadian population will begin to decline in the 21st century. The population is also ageing, which will place higher demands on certain services, such as health care. As in other developed countries, the age profile in Canada continues to veer away from patterns in developing countries.

Recent demographic studies have stated that for immigration to significantly alter the demographic structure of Canada, more than a million immigrants per year would have to be admitted.[4]

Major urban areas continue to attract the bulk of immigrants. In 1996, 85% of all immigrants lived in a census metropolitan area. The composition of Canada's cities is changing. Immigrants as a percentage of population comprise 42% in Toronto, 33% in Vancouver, and 18% in Montreal.[5]

Canadians, especially the young, are beginning to adopt flexible identities, based on a more borderless world. Canadians are adopting new forms of cohesion based on multiple affiliations. The family is changing, with more common-law unions and same-sex unions, and with outsiders often playing the roles of family members.

There are changing views on how we define and value citizenship, and a growing divide between residency and citizenship, along with an increasing recognition of Aboriginal concerns.

(iii) Impact on Government

While the lives of individuals are being affected by these major trends, so too are the perceptions of and expectations from government. There is a growing loss of confidence in the ability of governments to effect change, acting alone, and a view that the government should move from "doer" to "facilitator."

There is an increased demand for new forms of partnership (government to government, government to private sector, government to non-governmental organizations (NGOs)). A need is seen for alternative service delivery mechanisms.

There is an increased emphasis on accountability and transparency, factual data as the basis for decision making, real consultation, and "value for money."

Any changes to legislation must take into account the state of readiness of the responsible department to implement them. Citizenship and Immigration Canada, like other federal departments, has been subject to major reductions in resources which, in turn, have had an impact on productivity and morale. In addition to this general feeling of malaise and deterioration, it has also had to respond to a noticeable movement from processing people to processing paper; to deal with a perception of greater risk taking due to inadequate resources, outdated systems, and incomplete intelligence information; and to adjust to the necessity of providing horizontal as opposed to vertical program management across government.

1.6 Challenging Assumptions

Many prevailing assumptions about immigration eventually reach the level of myth, which is an opinion, a belief, or an ideal that has no basis in truth or fact. Unfortunately, it requires much more effort (and information) to refute a myth than to create one. The emerging trends, if not sufficiently examined, will produce even more assumptions and myths about immigration and immigrants, damaging the program and alienating public support.

During our consultations, we were confronted by a number of significant assumptions. A few examples are: that borders can be hermetically sealed to keep out undesirables and allow in only those who are preselected; that it is possible to discern other people's intentions, that other people always know their own long-term intentions, and that those intentions do not change over time; that everyone wants to come to

4 Frank Denton *et al.* "Immigration, Labour Force, and the Age Structure of the Population." Paper presented at CERF-CIC Conference on Immigration, Employment and the Economy, Richmond, British Columbia, October 17-18, 1997, 21.

5 Statistics Canada, "1996 Census: Immigration and Citizenship," *Daily* (November 1997), 5-7.

Canada; that a population or demographic policy exists and is a cure-all for Canada's future; and that immigration is bad for the economy, taking jobs from Canadians and giving them to people from outside the country.

Such assumptions call for the development of much better information on the effects of newcomers on Canada. In turn, there is a need for better communication of this information to the general population, so that there will be a strengthened sense of accountability between citizens and government.

One cannot expect every Canadian to be part economist, part accountant, part social scientist, and part social activist. A critical role for government, still, is public advocacy based on complete and factual information. Governments must make the connection between what Canadians think, what Canadians value, and what is real.

Chapter 2

A New Legislative and Accountability Framework

2.1 The Need for a New Legislative and Accountability Framework

Since it came into force in 1978, the *Immigration Act* has been amended more than 30 times. As a result, the Act has become a complex, unwieldy instrument difficult for immigration professionals to comprehend and utilize, let alone the thousands of persons whose very futures are affected by its clauses and sub-clauses.

There is increasing demand for clear and transparent legislation. At the same time, there is the requirement to establish lines of accountability within the legislation, so that those using the system have recourse where a problem arises. Finally, to recognize the human element in the immigration process, it is important that the legislation be flexible enough to accommodate unforeseen circumstances without compromising the integrity of the overall system.

In developing a new legislative framework, it is not our intention to try to eliminate litigation. Any piece of legislation, no matter how carefully it is drafted, will inevitably generate legal action to test the limits of its meaning or application. In proposing a new legislative framework, we wish to introduce logic, clear objectives, basic principles and accountability mechanisms which reflect the current state of migration in the world and which can be adapted to the major trends we have identified.

In a democracy, the citizen is surely entitled to ask, and have answered, two basic questions concerning any piece of legislation. First, what is it that the law is designed to accomplish? Second, what evidence is there that this goal is being achieved? In this chapter, we set out the Objectives and the Means to achieve them, which we would hope to see enshrined in a new Immigration and Citizenship Act and a new Protection Act. We also set out which indicators might show that the implemented legislation is having, or is failing to have, the desired effect.

As a corollary, citizens must be able to ascertain how these indicators are being monitored, analysed and reported so that they can understand and participate in the debate on the impact of policy decisions and the development of new initiatives. This requires incorporating into the legislation a discipline that will ensure statutory, regulatory, and program accountability.

Accountability must be understood to include transparency, that is, the goals are set out clearly, all information required for effective evaluation is made available, and there is a clear indication of who is responsible and who must report. We return again and again to the necessity for transparency — the requirement that immigration and protection laws be implemented in such a way that the criteria used to make decisions are derived directly from the Acts and Regulations, and are readily available to the public in language they can understand. Transparency is a necessary condition for the effectiveness and efficiency of the immigration and protection programs and the maintenance of public confidence in their administration.

New legislation should embody simple expressions of the key principles underlying the immigration and protection programs, the Objectives, and the Means to achieve them. Legislation should also articulate coherent and objective program criteria, generally in a body of regulations.

But we do not take lightly the public's concern about "government by regulation," which has the connotation of government outside the purview of Parliament. Parliament must have the information and mechanisms necessary to remain guardian of the Act. One example of regulations undergoing a more thorough review is the *Access to Information Act;* its administration is reviewed on a permanent basis by a designated committee of Parliament.

There is another important level of accountability. Immigration and protection overlap federal and provincial jurisdiction in Canada. Given their fields of authority and responsibility in the federation, provincial governments have a vital interest in assessing program results and influencing the drafting of regulations. We will address the federal-provincial interface in greater detail in the next chapter.

There is a requirement that new and revised regulations be based on meaningful diagnosis and follow-up on program results, leading to fact-based modification of programs to ensure the ongoing effectiveness of the legislation.

2.2 Creating a Legislative Link between Immigration and Citizenship

Currently, more than 80% of recent landed immigrants (those that immigrated between 1991 and 1994) become citizens.[1] Therefore, in selecting landed immigrants, we are selecting potential citizens. The criteria for determining landed immigrant status should reflect the values we desire in our citizens. Citizenship criteria should require evidence that the individual has become part of the Canadian community, that is, has respected the laws of this country, and made an effort to establish and integrate into Canadian society. We explore an active concept of integration in further detail in Chapter 4.

To ensure consistency in these value systems and to establish a clear continuum of stages between landing and citizenship, we propose that the two current Acts be combined into a single piece of legislation.

RECOMMENDATION 1

To recognize and promote the continuum from landing to citizenship, the *Immigration Act* and the *Citizenship Act* should be combined into a single piece of legislation that includes explicit recognition of active participation in Canadian society as a requisite for citizenship.

2.3 Creation of a Separate Protection Act

Over the past two decades, the public has had much difficulty differentiating between people coming to Canada as immigrants and people who come seeking Canada's protection as refugees. There is also confusion in the basic objectives of the two programs, as well as in the various policies and processes used to implement them.

We protect persons for humanitarian reasons, to meet our international obligations, and to respond to international crises. Canada has entered into a number of international human rights agreements which carry with them certain obligations. The protection of persecuted persons is based on rights; it is inseparable from the notion of human rights. The caring and compassionate nature of Canadians should be at the root of these agreements. By acting in a humanitarian way and keeping its international obligations, Canada is also acting in the national interest in building a peaceful and purposeful global society. This represents the national interest in a much broader, less immediate sense.

Immigration decisions, on the other hand, are based on economic, social and cultural objectives designed to serve Canada's national interests in addition to the interests of those making applications to immigrate. Immigration relates to the selection, settlement, exclusion and removal of persons seeking to come to and remain in Canada. Immigrants are admitted in Canada's national interests, fairly narrowly defined. Self-supporting immigrants are selected on the basis of their ability to contribute to Canada's economic, social and cultural vitality. Family class immigrants are admitted in line with the conviction that Canadian residents and citizens should be able to live together with their immediate family members.

We received many submissions requesting that the public be better educated on the differences between immigration and refugee status. We agree with this. A separate Act dealing only with humanitarian migration would create a focus for persons seeking Canada's protection, and ensure that the means and resources are clearly directed to this purpose.

To this end, we propose a separate Protection Act. This Act, among other things, would establish separate qualification criteria, management and delivery mechanisms, and settlement arrangements. The details of our proposal are found in Chapter 7. While individuals granted protection under the Protection Act would still have to meet the statutory requirements (medical, criminal, and security) in our proposed Immigration and Citizenship Act in order to acquire landed status, distinct Acts would create clearer lines of accountability for the two streams.

1 Statistics Canada, "1996 Census: Immigration and Citizenship," *Daily* (November 1997), 8.

RECOMMENDATION 2

Separate protection and immigration legislation should be created to emphasize the different goals of Canada's humanitarian commitment and its immigration program. The Immigration and Citizenship Act would apply to the selection and integration of immigrants and the admission of visitors, students and temporary workers. The Protection Act would focus only on those seeking protection.

2.4 Structure of the Legislation

We heard repeatedly of the need for a simpler, more objective Act written in plain language. We differentiate between the desire for simplicity and the risk of being overly simplistic. In our view, simplicity can be achieved by revising the Objectives, by introducing specific Means for achieving them and holding persons accountable, and by identifying the rights and responsibilities of those involved. Simplicity can also be achieved by restructuring the central programs. For example, in Chapter 6, we propose new selection criteria for the Self-supporting Class of economic immigrants, and in Chapter 7, we propose reducing the number of decision makers involved in protection decisions. The streamlined systems that we propose in the chapters that follow are designed to reduce the numbers and levels of avenues for decision making and reviews. This would improve the service to all concerned.

Procedural and administrative details, which currently clog parts of the present Act, would be shifted to the Regulations. A clear choice must be made between what appears in the Acts and what appears in the Regulations. Certain parts, which for us are centrepieces of the immigration program (e.g. independents), do not appear in the present Act. For example, family is currently defined in the Regulations. It should be in the Act. Elements that affect status should be in the Act. For example, where there exists the potential to deny serious rights, as in the case of detention, provisions to address this issue should be included in the Act. On the other hand, program components should be included in the Regulations. As we will discuss later in this chapter, there must be a direct link between program guidelines and either of the Acts or their Regulations.

RECOMMENDATION 3

The Immigration and Citizenship Act and the Protection Act should be constructed as framework legislation reflecting their respective Objectives. The Acts should contain those essential elements that could seriously affect the status of individuals. Program design and administrative elements should be in the Regulations.

2.5 Objectives and Means

Critical to the framework of any new legislation is the clear articulation of the purpose of the Act. This is usually accomplished by delineating clear Objectives in the Act. We believe that the Objectives must reflect basic concepts and values and respond to the dominant trends of the times. In developing new Objectives for both the Immigration and Citizenship Act and the Protection Act, we have been influenced by the concepts, values and trends outlined in the previous chapter. Many of the representations made to us reflected similar ideas.

Objectives must also be realistic. Immigration legislation by itself cannot be the panacea for all of Canada's ills. Immigration legislation cannot resolve problems of regional economic disparity without infringing on mobility rights. Immigration cannot significantly alter the size or structure of the Canadian population unless the government decides to increase immigration to more than five times its current level. Demographics are the result of a combination of many areas of public policy working together. Consequently, we do not specify a demographic Objective.

Some objectives of the current Act are outmoded, and no longer reflect the Canadian reality. For instance, in an environment influenced greatly by the *Canadian Charter of Rights and Freedoms,* we suggest that the commitment to non-discrimination in the current Act should be more than simply a laudable goal, but also a provision of virtually every policy and program emanating from the new Acts.

Increasingly, Canadians are demanding accountability. To build the discipline of accountability into the legislation, we are also proposing to include a section on Means in both the Immigration and Citizenship Act and the Protection Act. This is new. The Means we propose provide practical methods to ensure that the

Objectives of each Act are met and allow for more informed and substantive debate on the issues.

RECOMMENDATION 4

The Objectives of the Immigration and Citizenship legislation should be to:

(a) Facilitate the entry, whether temporary or permanent, of those persons who will contribute to Canada's prosperity and to the economic well-being of Canadians;

(b) Create and maintain those conditions necessary to ensure that persons here on a permanent basis become full participants in Canadian society in exercising both their rights and responsibilities;

(c) Promote self-sufficiency and security in social and economic terms by recognizing the integrity of the family in its many forms;

(d) Enrich the culture of Canadians; and

(e) Create and maintain those conditions necessary to protect the health and safety of Canadian society and deny the use of Canadian territory to persons likely to engage in criminal activities, whether defined nationally or internationally.

The Means for achieving these Objectives should be:

(a) Providing *full information* to allow for public education;

(b) Ensuring that the immigration program reflects the input and analysis resulting from *research and consultations;*

(c) Ensuring that the immigration program meets its stated goals through *accountability measures and due process;* and

(d) Ensuring appropriate *communication and coordination* with the protection agency, other federal departments, and other orders of government.

RECOMMENDATION 5

The Objectives of the Protection legislation should be to:

(a) Enable Canada to take leadership in the international community to better organize the sharing of responsibility for the identification of and the provision of assistance to those who require protection;

(b) Fulfil our domestic obligations with respect to international humanitarian and human rights law; and

(c) Uphold our obligations by ensuring that we extend our protection only to those who require and deserve it.

The Means for achieving these Objectives should be:

(a) Developing *international systems of identification and assistance* for those in need, based on international principles of protection;

(b) Offering protection to persons *in most need at first opportunity:* overseas, at point of entry, inland;

(c) Providing *full information* to allow for public education;

(d) Ensuring that the protection program reflects the input and analysis resulting from *research and consultations;*

(e) Ensuring that the protection program meets its stated goals through *accountability measures and due process;* and

(f) Ensuring appropriate *communication and coordination* with Citizenship and Immigration Canada, other federal departments, and other orders of government.

2.6 Building Accountability

As we have pointed out, it is essential to build a legislative and accountability framework in tandem. Failure to do so presents the possibility of new policies and programs being introduced without public knowledge or public consent. The accountability discipline can be introduced in practice by making processes and procedures more transparent and sensitive to client needs.

(i) Transparent Regulatory Process

One of the most pervasive criticisms we heard was concern about the tendency to make key program and policy decisions by changing the Regulations through Orders in Council (decreed by a sub-committee of Cabinet) instead of through legislation with full debate in Parliament. Examples of such decisions are the determination of visa-exempt countries and criteria for sponsorship.

Another criticism concerns the present requirement to pre-publish and then publish regulatory changes. This is seen, at times, to be perfunctory and meaningless. The current requirement establishes that proposed regulations must be pre-published in the *Canada Gazette* for a minimum period of 30 days to allow sufficient time for consultation and input on the potential impact of the new regulations. In certain cases, this consultation time can be reduced with special permission.

We recognize that there will be situations where early exposure of a policy or program could be harmful to the public interest. There is clearly a need to balance the requirement for flexibility and speed with the need to be transparent as well as accountable to both legislators and the public. Our preferred solution is to include outside bodies such as a parliamentary standing committee or the proposed Federal-Provincial Council on Immigration and Protection (see Chapter 3) as an integral part of the regulatory process. This would ensure a broader base of discussion. Within these new forums, the federal government would be challenged to illustrate that proposed new regulations met the Objectives of the Act and were supported by data-based research and analysis.

RECOMMENDATION 6

In addition to the current requirement that proposed regulations be pre-published in the *Canada Gazette,* the Immigration and Citizenship Act and the Protection Act should stipulate that regulatory amendments must be submitted for advice to a parliamentary standing committee and/or the proposed Federal-Provincial Council on Immigration and Protection. Amendments to the Protection Act would also be referred to the proposed Protection Advisory Committee.

(ii) Departmental Operating Procedures

Statutes and regulations do not constitute the only instructions provided to departmental staff with regard to their responsibilities. Regulations, in fact, serve as the middle ground of a continuum that begins with the Act through to what are currently referred to as "administrative guidelines" or "manuals," which in turn are supplemented by operations memoranda and still less formal written and oral instructions. Non-regulatory instructions are now contained in a series of manuals — some recently updated, some badly outdated, many effectively unavailable to the staff who require them for reference. There are over 20 manuals and hundreds of operations memoranda totalling several thousand pages.

Much of the material in these guidelines is genuinely administrative in nature, but much is, in fact, of a policy nature. A number of long-standing programs (Family Business Job Offer, and Last Remaining Family Member are two of the oldest) are not described in the Regulations but found only in the guidelines. Likewise, policy instructions affecting the disposition of thousands of cases annually are not found in the Regulations, in spite of the fact that the current Act contains a provision for defining such classes of immigrants in the Regulations. For example, one instruction directs that applications for landing made in Canada by the spouses of Canadian citizens and residents be routinely accepted for processing under the humanitarian and compassionate provisions of the Act. Other "programs" exist only in unwritten decisions made at the operational level, such as the program leading to the routine acceptance of parents and grandparents for inland processing using the same provision.

Applicants have the right to know what the rules are, and the public has the right to be given the opportunity to debate the creation of such semi-formal programs. Otherwise, the principle of transparency is subverted. For example, spouses of Canadian residents inquiring at overseas posts are advised that they cannot enter Canada for the purpose of completing the processing of their application. If they reach a port of entry, however, they are admitted for that very purpose and their application to apply from within Canada is more or less automatically approved. Departmental

documents on the subject tread the fine line between denying and actually acknowledging this inconsistency.

Some information packages provided to the public are misleading. Immigration applicants should not have to surmise or figure out, through the grapevine or by hiring expensive expert help, the basis on which the department really makes decisions affecting their lives and the lives of their loved ones.

Such a situation is the inevitable result of resorting to administrative guidelines rather than regulations to create immigration programs. A clear distinction should be made, and maintained, between genuine administrative guidelines — e.g. instructions for the completion of forms, lists of codes, personnel and financial administration — and program and policy directions advising field staff on how to interpret the Act and its Regulations. Well-written regulations on carefully designed programs should, as a rule, require little elaboration.

There is an important line that exists between regulations and their interpretation. Since the mechanism for ensuring adherence to this recommendation is a question of departmental management, we would suggest that it is essential that the department's internal audit function assume this as part of its responsibilities.

RECOMMENDATION 7

Decision making for all immigration and protection programs should be based on grounds elaborated in the Regulations, not in departmental guidelines.

(iii) Development of User Guides

Even the best regulations will, however, require some explanation for officers in the field. This should be kept to a minimum. Officers need to be trained *in the law.* It is the law that is the instrument of public policy, and officers are public servants. Instructions provided by the department to its decision makers should also be available to applicants since their applications will be assessed, and approved or rejected, by these same public servants. Only instructions concerning security issues should be exempted from this principle. Once the genuinely administrative aspects of departmental guidelines have been assigned their proper place, a guide to the rationale and the steps for making decisions in specific situations must be developed.

We propose a User Guide as a companion to the Act and Regulations. It would not include purely administrative information, nor would it include *de facto* programs that more properly belong in regulations. The User Guide would explain to departmental staff, and to the public, the procedures for processing applications, how the principles of procedural fairness could be ensured in various situations, and how to interpret, in practical terms, the definitions and requirements outlined in the legislation.

For example, the User Guide might advise officers that an application could be refused following the failure of an applicant to appear for an interview without due cause on two occasions, explaining the types of situations that would constitute due cause; provide direction on which documents are normally sufficient for demonstrating various personal relationships and on possible steps to take should documents be unavailable; explain how to assess language abilities if a standardized test is not currently available; provide direction on interpreting the phrase "cohabitation"; outline the obligations, under procedural fairness principles, of an officer who believes, as a result of an interview or after examining documents, that misleading information has been presented; and advise officers on how and when to forward cases to their director general or to the Minister for consideration of the use of residual powers (see Chapter 10).

We would foresee the User Guide being published in one or two volumes, as well as electronically. We wish to adopt the best practices found in plain language guides to legislation and transparent administrative guidelines (such as the user guide and *Procedures Advice Manual* in Australia's immigration system), along with the principles of public access found in the *Canadian Environmental Assessment Act* and other legislation, and then take these features one step further. To this end, we propose the creation of two User Guides, one for immigration and one for protection purposes. The User Guides should be available for purchase or accessible for reference free of charge at all visa and protection offices, in public libraries and on the Internet.

RECOMMENDATION 8

For the purpose of ensuring consistent decision making, the Immigration and Citizenship Act and the Protection Act should require the department and the protection agency to develop comprehensive, plain-language User Guides to the Acts and Regulations. Instructions given through the User Guides would be binding. The User Guide would serve as the primary source of information for applicants.

We would suggest that new editions of the User Guides appear on a regular basis, serving as a common and up-to-date source of authoritative direction for all those involved in, and affected by, the programs. To ensure that everyone concerned understands the same ground rules, new directives to staff would only come into effect once they were published in this public document. Thus, most changes to the User Guides would only be implemented at the time of the next edition. If, in rare circumstances, such as when required by a court decision, urgent revisions were required, these changes could be issued in a press release and in electronic format on the Internet, with reference to the particular section of the User Guide they are replacing. Such situations, however, would have to be truly exceptional.

RECOMMENDATION 9

New directives modifying the information, instructions or interpretations found in the User Guides could only enter into effect after their publication in new editions of the Guides.

(iv) Integrating Legal Decisions

In essence, immigration and protection work is the processing of cases, and the current Act is a sophisticated instrument for advising staff on how to dispose of applications. Currently, three tools help translate the Objectives of the Act into practice: regulations, administrative guidelines, and directions provided by the courts in their interpretive role.

We have already addressed the need to create User Guides, but this is not sufficient. After speaking with a number of officers in the field who must often assess complex cases presented to them by individual applicants or their counsel, we came to the conclusion that in many cases, front-line staff are not well informed about the impact of recent court decisions. On many occasions, immigration lawyers and consultants, rather than their own department, direct their attention to pertinent judicial decisions. To serve the public interest, decision makers in the field must be experts in immigration and protection law. Any lower standard is unacceptable.

To achieve this, the relationship between the Department of Justice, Citizenship and Immigration Canada, the protection agency and field officers must be designed to maximize the degree and, crucially, the currency of the expertise available to those rendering the decisions. Advice must be provided systematically and promptly to managers, and the cumulative inventory of decisions impacting on case processing must be incorporated as a key element into ongoing staff training. Whenever feasible, regulations should be amended to take jurisprudence into account and thereby maintain the coherence and transparency of the legislative instrument.

Accurate and current information on the legal aspects of case processing must not only flow to the field. The department — not the courts — bears primary responsibility for ensuring that individual cases are dealt with in accordance with the Act, the Regulations, and recent judicial interpretations. Transparency requires consistency. We cannot emphasize strongly enough our conviction that the department must establish mechanisms for the routine quality control of case decisions, especially those involving new regulations or new program guidelines, those affected by recent court rulings, and those involving the use of exceptional or discretionary powers. Without quality control of casework, parliamentary overview of departmental accountability has little meaning.

To protect the public interest and ensure that the programs delivered in the field achieve the Objectives of the legislation, field officers should have at least the same level of training, knowledge and expertise as those who provide immigration services for profit. We have heard a good deal of concern that, as one training officer in the department expressed it, the legal environment of decision making grows ever more complex while decision-making functions are delegated to ever lower levels of departmental staff.

RECOMMENDATION 10

Officers rendering decisions should be provided with the training and support necessary to ensure that they are current with the Objectives of the legislation. Employees should be made aware of the operational impact of key court decisions through a report within 30 days of the court decision.

(v) Reporting Results to Parliament

Departments must be accountable to the public for their operations through Parliament. The current Act requires annual reports to Parliament; we recommend that this principle be retained and expanded in the new legislation.

Given the Objectives that we see as key to these Acts, and given the public's increasing insistence that the practical results of government policy and programs be analysed, articulated and made public, we believe these reports should be more substantial, and that they should focus on the essential questions: What does the public expect from the immigration and protection programs? Are these expectations being met as a result of the policies and programs in place? Are the programs being operated with reasonable efficiency and accountability?

The main components of the annual reports should consist of, first, formal comments received through the year from such institutions as the Office of the Auditor General, the standing committees of Parliament and the proposed Federal-Provincial Council on Immigration and Protection; and, second, key performance indicators showing, for example, which categories of immigrants entered Canada during the past year, in what numbers, how they succeeded or failed in relation to the Objectives of the Acts, and other pertinent facts on the actual program performance.

RECOMMENDATION 11

The Immigration and Citizenship Act and the Protection Act should direct the Minister responsible to submit to Parliament an annual report, including comments on the general administration and management of the respective Acts from such bodies as the Office of the Auditor General, the standing committees of Parliament, and the proposed Federal-Provincial Council, as well as key indicators of performance over the previous year. The annual reports to Parliament should be written in plain language, published, and made widely available.

(vi) Performance Indicators

As we indicated in the Introduction and in Chapter 1, we must move immigration and protection issues out of the realm of myth and speculation. We need not be afraid of the facts. The public, for example, cannot assess the wisdom of a particular category of immigration and its defining criteria if it does not know, beyond anecdotal evidence, how the immigrants concerned are faring in Canadian society, and whether they are enriching or weakening the fabric of their communities, cities, provinces and country.

With regard to the proposed Immigration and Citizenship Act, certain indicators related to the Objectives should be required by regulation to be part of the annual report. These might include the number of landed immigrants by category (those entering to contribute to economic growth, those entering to promote self-sufficiency and support the family) and province of destination; the number of temporary workers, with particular emphasis on their distribution by economic sector; case-processing times by category, world region, and post; indicators of integration such as rates of use of public assistance, rates of employment and taxes paid, and respect for the law; compliance rate by family and employer sponsors; percentage of immigrants enrolled in self-financed language training; number of new citizens as a proportion of those eligible; number of entries denied and permitted under exceptional measures; number of refusals based on criminality and medical inadmissibility; and number of deportations, exclusions and removals under danger to the public provisions.

This is not meant to be an exhaustive list, but rather an indication of how serious we believe the department must be in generating meaningful, concrete data that can sustain informed discussion of immigration policy.

The legislative requirement to compile such a report should significantly improve the department's research function. In addition, most integration data would have to be provided by the provinces and others. The practical and systematic study of immigrant success is, in our view, long overdue and should be required by the Act.

Not all indicators of success can be measured; many of the best reasons for welcoming immigrants do not lend themselves to statistics. Their decision to become Canadian citizens will be a strong indication that we are on the right track. Unfortunately, we note that much of the media coverage on this issue is both anecdotal and negative, and that the conclusions drawn are often not borne out by the data. We hope that the annual report, with its indicators, will inspire Canadian society, the media and the government to focus on success stories, not just problems. A positive focus is a collective responsibility that is critical to the entire program. We believe that a comprehensive annual report will spark this responsibility.

It should be stressed that indicators of integration, demonstrating immigrant success or failure, are designed to measure the impact of various immigration programs. They are not intended to measure success on the basis of national, ethnic, regional, racial or religious origin.

Equally, the term "system integrity" does not refer only to enforcement activity, but also to the overall effectiveness of the program.

RECOMMENDATION 12

The Immigration and Citizenship Act should outline the broad categories of immigration performance indicators to be included in the annual report to Parliament. Within these categories, the particular indicators to be included should be outlined in the Regulations so that they might be revised from time to time to reflect that the Act is meeting its Objectives.

The broad categories of indicators outlined in the Immigration and Citizenship Act should be:

- **Number of immigrants and temporary entries;**
- **Case-processing times;**
- **Indicators of integration; and**
- **System integrity indicators.**

Under the Protection Act, indicators would focus on those elements that demonstrate to what extent the Objectives of that Act are being met, and might include: comparative processing time frames in Canada and abroad; comparative acceptance rates by country of origin and by gender for in-Canada and overseas determinations; and performance indicators (e.g. use of social benefits, employment rates) showing the degree of successful integration through government, non-governmental organizations, and combined programs.

The indicators might also identify under which conventions persons have been accorded protection. It is crucial that Canadians be able to see, year by year, whether or not the protection agency is succeeding in providing fair, timely and consistent application of Canada's humanitarian priorities, and whether or not those offered protection are being afforded the settlement services required to make them full members of Canadian society.

RECOMMENDATION 13

The Protection Act should outline broad categories of protection performance indicators to be included in an annual report to Parliament. Within these categories, the particular indicators should be outlined in the Regulations so that they might be revised from time to time to reflect that the Protection Act is meeting its Objectives.

The broad categories of indicators outlined in the Protection Act should be:

- **Number of persons granted protection abroad and in Canada, by relevant convention;**
- **Processing times for protection claims;**
- **Indicators of integration for protected persons; and**
- **System integrity indicators.**

(vii) Managing Numbers

Our emphasis throughout this report is on the quality of people coming to Canada, not the quantity. Nevertheless, if all orders of government are to provide meaningful integration services to newcomers and to do a good job welcoming, educating, employing and making citizens of immigrants, they must know the approximate number of arrivals to plan for in coming years. Hard limits may not be essential for all programs, but full cooperation among orders of government responsible for immigration should lead to a way to manage the number of future arrivals.

We will not discuss here the preferred "levels" of immigration. It is evident from the tenor of this report that we eagerly accept the challenge, stimulation and enrichment of the fabric of our society that immigration provides. It is also evident, we hope, that our nation's ability to successfully engage the talents of newcomers to our common benefit must be measured in a systematic and ongoing fashion.

It is our view that in addition to assessing the performance of recent immigrants, any discussion of future volumes of immigration should include a realistic assessment of which resources various orders of government are prepared to commit to the processing of applications, settlement services of all kinds, and the enforcement of the Act. This is equally true of decisions made with regard to the number of persons abroad to be granted protection under the Protection Act. If we are to help the most needy, we must provide for their needs. If governments are unwilling or unable to commit the resources required to manage high numbers, this should be seen as, effectively, a decision to reduce levels. To maintain a high volume of immigration and offer protection to high numbers of persons from abroad without committing the resources necessary to integrate the new arrivals and enforce the provisions of the respective Acts, risks undermining the effectiveness of and public support for both of these programs.

We have no fear of the term "quota" in the sense of numerical caps on certain programs even if, because of the word's historical baggage, we prefer to speak of "legal ceilings" to avoid any misunderstanding. Any legally established ceilings on individual immigration programs — any program quotas — would be blind to race, colour, ethnic group, country of origin and religion.

Other methods of managing the size of programs severely limit our proposed principles of efficiency and transparency. Without legally binding numeric ceilings, the department can only meet targets through such methods as resource allocation, continual revision of selection criteria (leading to confusion and inefficiency), or informal signals to the field (rarely made public) to intentionally slow down or speed up processing.

We much prefer that, once a full public debate has taken place on the nature of newly proposed programs, the government announce both targets and ceilings for individual programs.

When new programs with outcomes that are difficult to predict are being instituted, it is reasonable to provide the department with simple and transparent tools to ensure numbers do not overwhelm either the in-Canada service network or the original intention of the programs with regard to policy. Legal ceilings in this context are not in and of themselves expansive or restricting, nor pro- or anti-immigration. The legal ceiling on a given program, depending on the overall target chosen by the government, might be set either lower or higher than current levels. The ceilings would be based on objective research. The Act would stipulate that within a reasonable margin of error, the department would be prohibited from issuing more visas in a given year than the announced ceiling.

Some programs should be exempted from legal ceilings. No government planning requirement should prevent the reunion of Canadian citizens or landed immigrants with their spouses and dependent children or slow the landing of those to whom Canada has granted asylum under the Protection Act. The Protection Act should authorize the Minister to increase protection ceilings if conditions so warrant. Furthermore, given the often urgent need for specialized workers in an increasingly globalized economy, workers sponsored by Canadian firms in the Self-supporting Class should also be processed immediately, regardless of planning targets.

We also believe that, for reasons of efficiency and fairness to our applicants, the department should accept those applications it intends to process in a reasonable time frame. Given the legal requirement to cease the issuance of visas when program ceilings are met for a particular year, the department must have a tool to prevent the relentless and inefficient build-up of backlogs and inventory. This tool must be managed in such a way that applicants from various world regions, and at posts with varying processing backlogs, are treated equitably.

RECOMMENDATION 14

The Immigration and Citizenship Act and the Protection Act should include a procedure whereby the Minister would discuss with the Federal-Provincial Council on Immigration and Protection, the protection agency and other interested groups, appropriate numbers of persons in immigration and protection programs for the future. In the interim, numbers should be maintained at approximately the current level.

RECOMMENDATION 15

Once the desired volume of immigration has been established, the government should establish both targets and ceilings for visa issuance for each immigration category, with the exception of spouses and dependent children, persons granted protection within Canada, and employer-sponsored workers. The Immigration and Citizenship Act would prohibit the department from issuing more visas in a given year than the announced ceilings.

RECOMMENDATION 16

The Immigration and Citizenship Act and the Protection Act should give the Minister the authority to decide when to receive applications in all categories, with the exception of spouses and dependent children, persons granted protection within Canada, and employer-sponsored workers.

(viii) Immigration Fees

In our consultations, a number of concerns were expressed about the impact of current fees, especially the right of landing fee, as a perceived impediment to family reunification and rapid integration. There was also concern about the complexity of the application fee structure, and about the rationale for setting fees at particular levels.

In spite of recent improvements, the fee structure remains complex and often confusing. There appears to be no rationale for the fees assessed for different procedures. According to the department, cost recovery varies from 98% for the reinstatement of visitor status to only 7% for replacement of an immigration record. In order for applicants to understand the reasoning behind fees and to believe that they are receiving value for their money, there is a need for greater transparency and precision in the fee-setting process, and a closer relationship between fees and actual costs.

RECOMMENDATION 17

The Minister should establish a working group with organizations representing the interests of clients to examine the rationale for the right of landing fee and to develop application fees that reflect the costs of services provided.

To ensure that immediate family members are not separated for long periods because of an inability to pay fees, the department should adopt the successful model of the transportation fee loan plan for those families (spouses and dependent children) demonstrating financial need. The loans should be contingent on income and repayable when the person is in a position to do so.

RECOMMENDATION 18

The Immigration and Citizenship legislation should allow for loans to help with the payment of immigration-related fees for spouses and dependent children.

At the present time, only the province of Quebec participates in an ongoing manner in the selection of immigrants. In the future, other provinces may wish to do so, or may develop other types of arrangements with the federal government to meet their immigration priorities. It will become increasingly important that the fees charged by the federal government accurately reflect those immigration activities performed by each order of government, and the real costs of these activities. Currently, for example, Quebec undertakes the selection of independent immigrants, yet the federal government charges these applicants the same fee that it charges independent immigrants who undergo a selection process operated by the federal government.

RECOMMENDATION 19

The federal government should negotiate a fee-sharing formula for immigrants selected by the provinces. The formula should allow for different fees for those immigrants for whom the federal government is responsible for both selection and the examination of statutory requirements, and those immigrants for whom the federal government is responsible only for statutory requirements.

(ix) Immigration Lawyers and Consultants

The increasing incidence of paid immigration consultants and immigration lawyers in routine case processing is, in our opinion, caused by the policies of the government and the manner in which they are implemented by Citizenship and Immigration Canada. If tens of thousands of applicants decide each year to pay immigration consultants or lawyers thousands of dollars, in addition to the considerable processing fees paid to the government, in order to gain assistance in preparing and pursuing routine applications for permanent residence in Canada, we can only conclude that these applicants find the system difficult to understand and to access. In short, the applicants are not being deluded or tricked: they are consumers who have decided that our product is faulty.

The simplification of many aspects of immigrant selection that we propose in later chapters, and our insistence on objective, readily measurable criteria, would enable more and more applicants to feel confident that they can pursue their applications without assistance. Similarly, our recommendation that User Guides to the Acts and Regulations be created for use by both officers and applicants, should make the rules more transparent to all. In addition, we have made a recommendation that would allow the Minister to control the build-up of processing backlogs, which should decrease both the period of time that the application spends in the visa office and the tendency to "shop" between visa offices for faster processing — factors which, in our view and that of others, contribute to the need for lawyers and consultants.

In its communications with potential applicants, the department should continue to advise them that the use of lawyers or consultants is not required and will not result in preferential treatment in any way. The department must redouble its efforts to ensure, in fact as well as in theory, that officers do not provide, or appear to provide, preferential or expedited treatment of applications represented by lawyers or consultants.

All this being considered, the potential for exploitation of often desperate applicants by the completely unregulated profession of immigration consultancy is too serious a matter to be left in place. While no one, including members of the legal profession, would pretend that immigration lawyers are, as a group, immune from dishonesty and incompetence, the provincial law societies can bring professional discipline and the possibility of disbarment to bear on their members. Increased vigilance by provincial law societies with respect to immigration lawyers would certainly be welcome.

As demonstrated by a number of studies, inquiries and reports in recent years, most notably the 1995 report on immigration consultants prepared by the Standing Committee on Citizenship and Immigration, the issue of immigration consultants is not a problem with easy solutions. But the concerns of interested parties from virtually every facet of the immigration world are too pointed, too consistent, and too numerous to ignore. The Standing Committee report stated:

> We do not wish to imply that all immigration consultants are incompetent or unscrupulous; certainly we believe there are many reputable and reliable consultants who provide valuable services to the public. It is the complete absence of any regulations governing those whose behaviour is undesirable that represents a threat to the public. Indeed, reputable consultants themselves are foremost in recommending changes in their profession.[2]

Future actions regarding the role of immigration consultants before tribunals and adjudicators, or in preparing appeals to the federal court, must await the final resolution of an important case before the courts.[3]

Some have suggested that in the absence of provincial regulation of the profession of immigration consultancy, the department should take on this responsibility. We reject this suggestion. We do not believe that the department has the expertise to regulate professions. In our opinion, the provinces are better placed to regulate immigration consultants. To obtain a charter, they should lobby provincial governments to undertake this action, as many professions have done in the past. Should the provinces decide that regulating this profession is in the public interest, we would certainly encourage them to act, and act promptly.

While it might be decided in the context of the proposed Federal-Provincial Council on Immigration and Protection to allow the present system to continue while awaiting the regulation of the immigration consulting profession by a province or provinces, we believe the seriousness of the current problem requires immediate attention.

RECOMMENDATION 20

Persons paid to prepare and/or represent visa applicants or persons seeking protection should be required to be members of a professional association in Canada, that is, either a provincial law society, or an association regulated by a province.

2.7 Five-Year Review of the Legislation

Given the substantial changes we are recommending, we believe it is important for the Immigration and Citizenship Act and the Protection Act to be reviewed in a systematic way at an appropriate time following their implementation. The purpose of such a review would be to ensure that the provisions of the new Acts are meeting their Objectives and, if not, to recommend systematic modifications to the legislation. The current *Immigration Act,* we believe, has at times suffered from a large number of ad hoc modifications introduced over many years to meet particular needs, reducing its overall coherence and effectiveness. Following the model of the *Canadian Environmental Assessment Act,* a five-year time frame for review is recommended. This would be followed by a report by the Minister to Parliament outlining any changes required to ensure that the Acts continue to meet their stated Objectives.

RECOMMENDATION 21

The Immigration and Citizenship Act and the Protection Act should contain provisions requiring the Minister responsible to undertake a comprehensive review of the provisions and operations of the Acts five years after their entry into force, and to report to Parliament, outlining any recommended changes to the Acts.

2 Standing Committee on Citizenship and Immigration, *Immigration Consultants: It's Time to Act* (Ottawa: House of Commons, December 1995), 2.

3 *Law Society of British Columbia* v. Mangat, B.C. Supreme Court, Doc. No. C932910, Date of decision: August 14, 1997.

Chapter 3

Sharing Responsibilities: Innovative Approaches to Partnership and Cooperation

3.1 The Need for Consultation and Collaboration

"Democracy is the political system that has shown the highest will for community," wrote philosopher José Ortega y Gasset. "It takes to the extreme the determination to take account of others." This quotation illustrates the necessity for any public policy program to extend its reach to those who have a stake in the outcome.

We raise the matter of responsibility sharing early in the report because unless governments become serious about how costs and other inputs of running efficient immigration and protection programs should be apportioned, the best-intentioned policies will remain nothing but empty phrases. We are influenced in this direction by a number of trends outlined in Chapter 1, namely the loss of confidence in the government's ability to initiate change, the growing demand for new forms of partnership and true consultation, and the emphasis on "out-sourcing" and other non-conventional forms of public program delivery.

To be effective, government action, including legislative change, must be predicated on the active support of groups and institutions which have a direct interest in immigration and the protection of those seeking asylum. It must also incorporate accountability mechanisms, and provide regular opportunities for open discussion that will, in turn, inform the debate and the quality of consultation.

Clearly, provinces, municipalities, non-governmental organizations (NGOs) and others must have a say in the decisions that shape immigration and protection policy. There are two compelling reasons why they should participate: first, because resources are scarce and financial sharing arrangements need to be reviewed and strengthened; second, because Canadians are increasingly sensitive to the critical importance and impact of immigration on their society, their quality of life, and their values.

We firmly believe that immigration benefits Canadian society in the long term. Current research indicates that the economic, cultural and social benefits of immigration far outweigh the tensions it may occasionally cause. Research also shows, however, that the short-term costs for the reception of immigrants and asylum seekers are increasing.[1] In a time of budgetary restraint, we must rethink how we share the responsibility for the services that governments and the public must provide to newcomers.

Many partners of Citizenship and Immigration Canada have found fault with the way that the department discharges its functions, while offering few clear suggestions as to how its performance could be improved. Provinces and municipalities were particularly critical of the department's style and demands. They want to be associated not only with the problems being addressed, but also with the decisions taken that are sometimes at the root of these problems. We believe that this is necessary if immigration is truly to serve Canada's best interests and newcomers are to integrate harmoniously into our society.

The question is, what form should this partnership take? What are the goals of this essential discourse between the federal government, provinces, municipalities and NGOs and what mechanisms can be devised to achieve them?

There is confusion over the concept of partnership. Treasury Board has identified four definitions of partnership, ranging from the consultative to the collaborative.[2] We advocate different forms of partnership to suit different partners.

Consultation, the act of "asking for advice or opinion," is necessary to govern in a democratic state.

1 Don J. DeVoretz, "New Issues, New Evidence, and New Immigration Policies for the Twenty-First Century," in *Diminishing Returns: The Economics of Canada's Recent Immigration Policy* (Toronto: C.D. Howe Institute; Vancouver: The Laurier Institution, 1995), 24.

2 Alti Rodal and Nick Mulder, "Partnership, Devolution and Power Sharing: Issues and Implications for Management," *Optimum: The Journal of Public Sector Management*, Vol. 24, no. 3 (Winter 1993): 35-37.
The four main definitions are: 1) consultative or advisory arrangements that seek stakeholders' input on policies, strategies and program design and implementation; 2) contributory or support-sharing arrangements that increase or leverage resources or share the resource burden among several parties; 3) operational or work-sharing arrangements in the delivery of services; and 4) collaborative or decision-making arrangements that share power, work, costs and benefits.

Consultation in the context of Canadian policy has taken on a specific meaning — an exchange of views that implies some input in decision making. This consultation should affect operations and programming as well as broad values and policy directions. The objective is the ongoing development and management of the policy or program. Consultation assumes a high degree of mutual trust, a common set of data and adequate time to consider them, a willingness to listen, and outcomes that are not predetermined.

We recognize that consultations are only one source of input into the policy development process. However, those who are consulted understandably would like to see their efforts reflected in the decisions or at least understand why their efforts have been rejected. Otherwise, consultations run the risk of "becoming less of an information and advice exercise than a festival of complaints and attack on policy-makers."[3]

3.2 Sharing with the Provinces

Immigration is an area of concurrent jurisdiction between the federal and provincial governments, with federal paramountcy. Historically, the federal government has exercised control over immigration targets, and the selection and recruitment process. The *Immigration Act* requires the federal minister to consult with the provinces prior to setting an immigration plan. Such consultation has often been perfunctory.

We must bear in mind that, while the terms of their admission into Canada are set by the federal government, immigrants settle in neighbourhoods, towns and provinces, and move in and among them. It is in these neighbourhoods, towns and provinces that changes brought about by the arrival of newcomers are the most noticeable. This is where newcomers integrate, take root and make their place in Canadian society. A serious gap has developed between policy planning and service delivery at these levels.

Integration is not achieved by magic. Resources are needed to welcome immigrants and help them adapt. Newcomers sometimes need assistance to overcome the obstacles to employment their new situation has temporarily created. Many need to learn one of the official languages and perhaps upgrade their skills to enter the labour market. Federal program costs do not reflect the total integration costs of the immigrants. There is little analysis of the comprehensive integration costs to all orders of government.

In a situation where the federal government continues to determine the numbers and categories of immigrants Canada will receive, while having little control over where they will settle, provinces are left to carry the responsibility for integration. This "sharing" arrangement is obviously flawed. Recognizing this, the Canadian government is devolving the responsibility for integration to the provinces. Provinces are obviously better equipped than the federal government to discharge this responsibility since they can tailor reception and labour market integration services to local needs.

However, the problem is that provinces are wary of the federal government's intentions, knowing that they are at least partly motivated by a lack of funds. The federal government speaks of empowering the provinces. The provinces are understandably reluctant to negotiate the terms of this transfer. They know that the money the federal government intends to put at their disposal may be withdrawn without prior consultation. Provinces also know that the amounts offered by the federal government may not cover their expenses.

If the federal government is able to fully transfer responsibility to the provinces, immigrants may have to pay the price. Not all provinces have the same degree of proficiency or interest in the integration of immigrants. Unless their expenses are fully covered, some suggest they may withdraw from this activity altogether and let municipalities and NGOs assume the responsibility.

The federal government currently has agreements, varying in nature, with almost all the provinces. We encourage and support these bilateral agreements as they enable provinces and the federal government to clarify their mutual roles, promote the sharing of information, and let provinces devise their own solutions.

3 Leslie Pal, *Beyond Policy Analysis: Public Issue Management in Turbulent Times* (Scarborough: ITP Nelson, 1997), 218.

The Canada-Quebec Accord is the most comprehensive of these agreements, enabling Canada and Quebec to manage this shared jurisdiction effectively and efficiently to meet their respective objectives. Immigration officials from the two levels of government work together to deliver immigration services and meet regularly to discuss common issues.

We believe that more concerted effort is required, and our proposals are consistent with current federal government thinking to encourage interdependence among governments.

(i) Consultation Mechanisms with the Provinces

Citizenship and Immigration Canada is now required by Section 7(1) of the current *Immigration Act* to consult provinces on immigration levels. The department proposes a figure, provinces give their opinion, and the department takes action. The department may have an opinion and goals that the provinces do not share. On this matter there should be consensus and common decision making since both levels of government must bear the costs of the decision.

More generally, consultation should be conducted on a greater number of issues and with a larger number of stakeholders. As we alluded to in Chapter 2, consultations should be concerned not only with the levels (number), but also with the categories of immigrants Canada should receive and their destinations. They should also deal with a number of other topics, such as services to be offered to newcomers, labour market needs, and a more sophisticated assessment of the special integration needs of some individuals granted protection such as women, children or the disabled. This consultative process would improve immigrant selection and integration, and promote better policies which would earn the approval of participants in the consultation.

By and large, the department presently makes these decisions alone, after only a cursory consultation with its provincial partners. On the other hand, we suspect the provinces are not entirely unhappy with this situation because it allows them to use the federal government as a scapegoat for their lack of involvement in implementing integration programs. Some provinces are not quite ready to invest their scarce human and financial resources in the creation of an immigration infrastructure.

The decision in the past year of the Deputy Ministers of Citizenship and Immigration Canada to conduct regular bilateral meetings with their provincial and territorial counterparts is a step in the right direction. Federal-provincial discussion will become more meaningful as representatives from the two orders of government learn to trust each other.

(ii) A Federal-Provincial Council on Immigration and Protection

We propose a formal structure of ministers responsible for immigration and protection, which we would call the Federal-Provincial Council on Immigration and Protection, and which would have as its primary objective the development of policies and programs to provide better services.

The ministers would engage in policy making in all areas they deem appropriate, including those mentioned in this report. They would tackle issues that can only be resolved through a federal-provincial consensus and that currently hinder the attainment of immigration and protection goals. These issues include immigration levels, the harmonization of skills accreditation and credential recognition, standards for language tests, funding formulas and mechanisms for English- or French-language training, provisions for adequate health care for temporary workers and students, possible guardianship approval arrangements for young students, criteria for provincial nominees and others.

From the Federal-Provincial Council would emerge, it is hoped, a sense of collective responsibility for immigration and protection. We recognize that in such structures progress is often slow, because these processes require building trust and, initially at least, a focus on short-term goals. Special care would have to be taken to avoid sliding to the lowest common denominator or developing a "federal versus provinces" mentality. This is not the basis for true partnership.

There are several existing models of federal-provincial consultation at the ministerial level such as the newly established Ministerial Council on Social Policy Reform and the Council of Ministers of the Environment. There are regular federal-provincial ministerial meetings regarding agriculture, justice and finance. Ironically, given that immigration is an area of

concurrent jurisdiction, Citizenship and Immigration Canada is one of the few federal departments not to hold regular meetings of federal-provincial ministers. Federal and provincial ministers responsible for immigration have not met as a group since the creation of Citizenship and Immigration Canada in 1993.

This proposed structure will demand an adequate amount of support. First, it will require sufficient information, analysis and sharing of data among departments. We cannot emphasize enough the need to pool immigration data. It is from such data that more enlightened decisions can be made; it is also in light of such data that rumours and misunderstandings can be dispelled and excuses for inaction eliminated.

Second, it will require deputy ministers and other senior officials to meet regularly, to establish an agenda for the annual meeting of federal and provincial ministers responsible for immigration and protection, and to resolve any other outstanding issues that might be better resolved at the bureaucratic levels.

Finally, the organization and follow-up of meetings of ministers and deputy ministers will require a small permanent secretariat which might be seconded from the federal and/or provincial governments. We are not advocating the creation of another level of administration or another intermediary, but rather a mechanism to expedite the work and decisions of the council. The secretariat should be located in Ottawa, where much of the existing data are available, and should be funded by the federal government since it is the federal role to ensure that public policy in this area serves the best interests of all Canadians.

We will also be proposing a Protection Advisory Committee (see Chapter 7), which would include a representative from this council.

RECOMMENDATION 22

The Immigration and Citizenship Act and the Protection Act should create a Federal-Provincial Council on Immigration and Protection, where the ministers responsible would meet at least once a year, supported by a small secretariat. This Council would provide a forum for more structured consultation and policy development on issues of mutual interest.

3.3 Working with Municipalities

Municipalities are just as wary of their provincial governments as the latter are of the federal government. They suspect that their provincial governments may assign to other projects the funds which they receive from the federal government for immigration, leaving them without adequate resources to finance integration services.

Municipalities such as those in the Toronto region, which receives 42% of all immigrants to Canada (more than several of the smaller provinces combined), have no say in immigration matters because there is no structured means for receiving their input. We feel that there should be a mechanism to enable municipalities to make their voices heard, given their considerable involvement with the settlement and integration of newcomers to Canada. The Federal-Provincial Council should ensure that the municipalities have a place to provide their views, data and trend analysis.

3.4 Working with Non-governmental Organizations

To its credit, Citizenship and Immigration Canada has a long history of cooperation with non-governmental organizations. We have been truly impressed by the expertise and the dedication of the countless volunteers working in the fields of immigration and protection, and helping Canada maintain its tradition of humanitarianism.

NGOs are of various types and have different mandates. Most NGOs continually reassess the effectiveness of their actions and their success in helping newcomers integrate, and strive to improve their record. Organizations that monitor the rate of successful integration achieved by immigrants they have supported are absolutely irreplaceable and should be encouraged.

The department's attitude toward NGOs is variable. The department calls on them, gives the impression of holding them in high regard, and finances them or contributes to their financing. Yet, it occasionally fears them, sometimes ignores them when it should consult them, and often seems to take for granted their effectiveness or their ability to respond locally to emergencies.

NGOs also find fault with the department's pattern of consultation. Primarily, they object to the style of consultations, which is sporadic and initiated by the department, often without follow-up or with results shrouded in secrecy.

Consultation sessions should be more than just a lobby opportunity for NGOs. There must be a will on the part of both NGOs and the government to use these sessions for genuine advice and problem solving that goes beyond finger pointing and recrimination.

We believe that Citizenship and Immigration Canada has not yet found a proper way to consult with non-governmental organizations. The department's regional offices should develop an attitude of cooperation and dialogue leading to formal consultations with NGOs. The regional directors general, to their credit, have started to create these mechanisms. The mechanisms that must be fostered may vary depending on the subject, but efforts should be made to ensure that they are structured, timely and sophisticated enough to allow substantive discussion of issues. To guarantee the success of such forums, participants need to trust one another and show a determination to overcome problems. Trust is built in the same way at this level as it is between federal and provincial ministers and deputy ministers. However, the dynamics of regional forums are not the same as those of federal-provincial meetings, and many practices can be improved by open, direct and frequent meetings between the department and NGOs. Municipalities could be included in such meetings.

A prerequisite for the success of regional consultations is the empowerment of the department's regional offices to follow up on decisions. Often, we have seen trivial decisions unduly delayed by the regional office's obligation to consult with "national headquarters."

National headquarters, for its part, should see that a formula is developed to take advantage of the experience of national organizations in working out policies. Too often, the department has found itself in the situation of having to change directions and policies under the pressure of lobby groups. We suggest that a formal consultation mechanism be established, which would encompass national immigrant organizations, the Canadian Bar Association, business and other interested groups. It should be flexible enough to ensure the appropriate interested and knowledgeable parties are consulted on different issues.

We believe that organizations responsible for the reception and integration of newcomers, religious communities, municipalities deeply involved in the reception of immigrants, and persons responsible for vocational training and employment could likewise be brought together to review and develop departmental policies. Here again, the key is to clearly define the goals of consultation, to schedule regular meetings, and to follow up on decisions.

To be sure, these mechanisms, which should remain simple, will not eliminate representations to the Minister by pressure groups. But the department must learn to identify its real partners and treat them as such.

3.5 Sharing with Other Federal Departments

Consultations are also required within the federal government.

Immigration and protection have impacts on foreign affairs, health, national security, labour markets, industry and commerce, to name but a few. They are elements of Canada's foreign policy and can be called into question by changes in the labour market. It is surprising to see that immigration policy is not thoroughly discussed by interdepartmental committees and working groups.

The briefs submitted to us, for instance, revealed some confusion over the roles and mandates of Citizenship and Immigration Canada and Canadian Heritage, and a deep sense of frustration over the decision of Human Resources Development Canada to abandon labour market language training. Surprisingly, given the nature of immigration and its impact on the labour market, and the fact that employment and immigration belonged to the same department until 1993, there are no formal meetings between the most senior bureaucrats of Citizenship and Immigration Canada and Human Resources Development Canada. There is regular coordination at the officials level, but much could be accomplished by formal meetings at the deputy ministers level.

Many groups of senior civil servants meet on specific matters, of course. There are also several senior level steering committees on children, youth and regulatory matters. We have seen the value of achieving general agreement on the Canadian government's research priorities. We refer to the *Canada 2005* report, which was the result of consultations among departments represented by deputy ministers or their assistants.

The Minister of Citizenship and Immigration is a member of the two main Cabinet committees shaping the government's social and economic policies. However, the dynamics of these committees and the multitude of topics on their agenda make it difficult to accommodate in-depth discussion of immigration and protection policy.

The Privy Council Office has made a particular effort to rethink government through the sharing of horizontal responsibilities. The importance of working in this manner is crucial to the department given the impact of its decisions on demographics, the labour market and social programs. "Horizontality" cannot be just a buzz word; it must be articulated by flexible mechanisms.

As the decision on immigration levels affects so many other government departments, we suggest that Citizenship and Immigration Canada engage in meaningful discussions with other departments about optimum levels and their impact. We were told that an interdepartmental committee is assembled just before the issue of levels (or any other item) is submitted to Cabinet. We propose meetings over a longer time frame so that the implications can be assessed and properly discussed at senior levels. This will be even more necessary if the Federal-Provincial Council is to work effectively.

RECOMMENDATION 23

The Immigration and Citizenship Act should include provisions for formal, structured consultations on significant policy developments at the regional and national levels with non-governmental organizations, municipalities, business and other interested groups. Citizenship and Immigration Canada should develop and institute mechanisms that allow for structured consultations and proper research as part of the policy process.

Chapter 4

Community Participation: Active Integration

4.1 Introduction

When introducing the first *Citizenship Act* after the Second World War, Paul Martin, Sr., told the House of Commons: "Citizenship means more than the right to vote; more than the right to hold and transfer property; more than the right to move freely under the protection of the state; citizenship is the right to full partnership in the fortunes and in the future of the nation."[1] The "full partnership" brings with it both rights and responsibilities, which reflect core values and principles.

Some become citizens by birth, some by choice. Immigration is for many the first step in becoming part of the Canadian community, a step which may ultimately lead to citizenship. Therefore, the ultimate goal of selecting landed immigrants should be to select Canada's new citizens. Ekos Research Associates, in its *Rethinking Government* Study,[2] found "strong support for societal action to promote integration (not assimilation) and combat racism." We believe that there is a requirement for a more active concept of integration involving both community action and the participation of the individual. The process of settlement, adaptation and integration can be lengthy and complex — it may take several generations to complete — but it must be viewed as a continuum leading to citizenship rather than as disjointed and discrete stages.

To recognize the importance of integration to the success of the immigration program, its contribution to social cohesion, and the mutual accommodation and enrichment that occur between newcomers and Canadian society, we recommended earlier the following two objectives of the program:

- to create and maintain those conditions necessary to ensure that persons in Canada on a permanent basis become full participants in Canadian society in exercising both their rights and responsibilities; and
- to enrich the culture of Canadians.

4.2 Role of the Federal Government in Settlement and Integration

In the past half century, responsibility for settlement and integration has been shared by a number of parties — governments, employers, community groups, immigrant-serving organizations, and the immigrants themselves.

In 1948, the federal government established a settlement service across the country to provide reception, placement and guidance to new arrivals. In the same year, a federal program (the precursor of the Adjustment Assistance Program) was established to provide payment for hospital, medical and incidental expenses of indigent immigrants for up to six months. In 1951, the federal government made provision for contributions to voluntary agencies providing services to immigrants, a long-standing Canadian practice that pre-dated government activity in settlement and integration.

In the 1960s, the pendulum swung, and the then Department of Manpower and Immigration placed the onus for settlement and integration on employers and employees, reflecting the prevailing belief that immigrants should not receive services that were unavailable to Canadians.

In the 1970s, attitudes towards settlement and integration once again became more accommodating. In 1974, the Immigration Settlement and Adaptation Program (ISAP) was established to provide funding for non-profit organizations providing direct services to immigrants. The *Immigration Act* of 1976 included a specific objective on integration. However, other than Section 108 which directed the Minister to consult the provinces on matters "respecting the measures to be undertaken to facilitate adaptation of landed immigrants to Canadian society," there were no other provisions to give some form to this initiative.

The need for recognition of the responsibility for the funding and operation of integration services is particularly important in view of the 1991 Canada-Quebec Accord, whereby the federal government withdrew from providing settlement services in

1 House of Commons, Debates (March 20, 1946), 131.

2 Ekos Research Associates Inc., *Rethinking Government Study* (Ottawa: Ekos Research Associates Inc., 1995), 65.

Quebec and instead provided funds to the province to administer its own integration services. At the same time, the federal government funds non-governmental organizations (NGOs) to provide direct services through ISAP, the Host Program and Language Instruction for Newcomers to Canada (LINC), in addition to providing direct financial assistance through the Adjustment Assistance Program. Beyond these programs, the provinces and municipalities continue to absorb a great deal of the integration costs.

Our approach places increased emphasis on the role of settlement and integration; the need to identify the shared goals of all orders of government and NGOs; the need for cooperation, collaboration and accountability; and the requirement for adequate funding.

We found that not all provinces have either the will or the resources to manage integration. Furthermore, because immigration is a concurrent jurisdiction, there remains the need for the federal government to maintain an enduring role in ensuring immigrant integration and equitable access to services across Canada.

RECOMMENDATION 24

The federal government should acknowledge its enduring role in settlement and integration services; establish clear accountability guidelines; and provide adequate funding for settlement and integration services.

4.3 Need for Research-based Decisions

As we indicated in the Introduction, there is a striking lack of nuanced data in many areas. This holds true for settlement and integration despite the excellent initial work accomplished by the Metropolis Project. There is a critical need for resources and expertise to support informed decision making.

The various categories of immigrants follow different settlement patterns. Morton Weinfeld in his overview paper on the Metropolis Project literature, acknowledges that "very few studies cited focus on the impact of categories of immigrants (independents, investors, or business class, family class, refugees) on integration processes."[3]

If future selection policy is to lead to successful settlement and integration, there is a need to track immigrants from their time of arrival and to develop data on their conditions before immigrating, the factors that affect their success (and failure), programs that work (and those that do not), and the costs of settlement at all levels (federal, provincial, municipal). We have based our recommended model for selection of self-supporting and some family members (see chapters 5 and 6) on the limited existing data.

We are aware that the department recently released its Longitudinal Immigration Database (IMDB), which should in time be able to provide more information regarding the labour market behaviour of the landed immigrant population by matching administrative records on immigration, employment and taxation data. This is currently the only data source which links outcomes to immigration policy levers. Our hope is that researchers (government, Metropolis and others) will utilize this rich database to fill this void. We note that the department has recently assembled a cross-section of academics, NGOs and lawyers in a workshop to discuss future selection criteria. This is a good start.

RECOMMENDATION 25

The design of future selection criteria should be founded on adequate data-based research that analyses the integration patterns of various categories of immigrants.

4.4 Language Testing

In our consultations, we heard constantly that the knowledge of English or French is the key determinant for successful integration. In the criteria which we propose in the chapters that follow, we emphasize the ability of immigrants to function in French or English before coming to Canada; if they cannot do so, we

3 Morton Weinfeld, "A Preliminary Stock-taking on Immigration Research in Canada,"(Ottawa: Citizenship and Immigration Canada [Metropolis], 1997), http://canada.metropolis.globalx.net/research-policy/wienfeld/index_e.html

expect them to make a financial contribution to their own language upgrading.

Critical to this approach are the development and consistent use of a reliable language test. The department should consider using standardized tests developed by the private sector or adapting, for example, versions of the Australian, New Zealand or Quebec tests.

RECOMMENDATION 26

The Immigration and Citizenship legislation should require formal standardized language testing to determine knowledge of French or English.

4.5 Access to Trades and Professions

For individuals to be fully integrated and to become contributing members of Canadian society, they need to find employment that utilizes their skills and training. We have heard across the country and read in numerous submissions of the problems individuals face in working in particular professions and in having their credentials recognized. These systemic barriers in effect transform what should be transitional underemployment into chronic underemployment. This wasted potential results in a personal loss to the individual and to the country as a whole.

Each province at some stage in its history created bodies that were empowered to regulate access to trades and professions in the province through licensing and registration requirements. These associations have operated in an extremely independent manner, often free of political scrutiny and accountability. Many have used their role as protectors of the health and safety of consumers as a guise to protect the interests of their members through exclusionary entrance requirements. This has made interprovincial mobility for all Canadians extremely difficult, and has created even greater barriers for immigrants, who are viewed as a threat to the earning power of the members of some professional associations, and as unknown quantities with unknown qualifications by other bodies.

For example, in Ontario, there are at least 43 regulatory and professional bodies that regulate access to professions. In addition, more than 70 trades are regulated by the Ministry of Education. But there is no complete list of every regulatory and professional body in each province, nor of the provincial departments that are supposed to be responsible. This makes achieving compliance with the Labour Mobility Chapter in the Agreement on Internal Trade (AIT) virtually impossible, and Human Resources Development Canada (HRDC) is in the process of sending a questionnaire to every regulatory and professional body in Canada in order to develop a better grasp of this issue. Quebec's Office des professions has a watchdog mandate over regulatory bodies in that province.

There is no single body in Canada that assesses educational equivalency. Currently, there are six formal credential assessment services in Canada (in addition to dozens of informal services operating mainly for admission purposes in post-secondary institutions). The six services are:

- *Service des équivalences* (SDE), *Ministère des Relations avec les citoyens et de l'Immigration,* Quebec;
- Comparative Education Service (CES), University of Toronto, Ontario;
- International Credential Assessment Service (ICAS), Ontario;
- International Credential Evaluation Service (ICES), Open Learning Agency, British Columbia;
- International Qualifications Assessment Service (IQAS), Alberta; and
- Document Evaluation Service (DES), York University, Ontario.

With the exception of ICAS, all the major credential assessment services are operated either by a provincial government (SDE, IQAS) or in affiliation with a university (CES, ICES, DES). ICAS itself is staffed mainly by previous employees of a now defunct assessment service which operated within the Ministry of Education of Ontario.

In *Into the 21st Century: A Strategy for Immigration and Citizenship,* Citizenship and Immigration Canada made a commitment to establish a "national clearinghouse" on accreditation for the recognition of foreign credentials[4] but little has been done to date in this regard. The department co-chairs the Federal-Provincial Working Group on Access to Trades and Professions. HRDC participates in this working group and is closely involved in implementing the AIT Labour Mobility Chapter.

The Canadian Information Centre for International Credentials (CICIC), funded by HRDC and the Council of Education Ministers, Canada, plays an advocacy role in collecting, organizing and distributing information, and acts as a referral service to support the recognition and portability of Canadian and international educational and occupational qualifications. At the national level, the CICIC brings together people and organizations with common concerns, and encourages collaboration, information sharing, the efficient use of resources, and awareness of international policies. However, the information is neither comprehensive nor widely available.

The Ontario and Quebec governments are major provincial players in the access to trades and professions field. The Access to Professions and Trades (APT) unit of the Ontario Ministry of Citizenship, Culture and Recreation plays an advocacy role with regulatory bodies and industry to promote equal employment opportunities for immigrants. The APT unit co-chairs (with Citizenship and Immigration Canada) the Federal-Provincial Working Group on Access to Trades and Professions. The APT is also working with nine regulatory bodies and professional associations on a pilot project in which fact sheets are distributed through English-as-a-second-language classes and the Internet. The APT view is that the information must be relevant at a provincial rather than a national level to be of any practical use.

The *Service des équivalences* of the Quebec *Ministère des Relations avec les citoyens et de l'Immigration* participates in the *Conseil interprofessionnel* which seeks to harmonize the way in which credentials are being handled in Quebec.

Other provincial governments taking a close interest in the issue of foreign credentials are those of Alberta (through IQAS), Manitoba (through Immigrant Credentials and Labour Market) and British Columbia (through the Ministry Responsible for Multiculturalism, Human Rights and Immigration).

Even with the mechanisms already in place, there are few instances where a regulatory body grants full recognition to foreign-trained workers without having them complete courses or spend additional time working in the occupation in a learning capacity.

We recognize that there is no simple solution to the problem. It requires leadership, dedicated resources and coordination.

Citizenship and Immigration Canada should monitor the policies and actions of professional bodies with respect to access, and convey any changes (e.g. new requirements, fee increases, form changes) to posts overseas without delay.

The department should ensure that information on current labour market trends and various trades and professions is distributed overseas on a timely basis so that prospective immigrants have the opportunity to make informed choices on their likelihood of working in their profession or trade in Canada. It should also ensure that current labour market information and information on various trades and professions are clear, transparent and culturally sensitive.

RECOMMENDATION 27

The proposed Federal-Provincial Council on Immigration and Protection should establish access to trades and professions and foreign credential recognition as priorities and work with other relevant groups, such as the existing Forum of Labour Market Ministers, to resolve issues of restrictive access.

4 Citizenship and Immigration Canada, *Into the 21st Century: A Strategy for Immigration and Citizenship* (Ottawa: Supply and Services Canada, 1994), 21.

RECOMMENDATION 28

The Federal-Provincial Council on Immigration and Protection should take measures with existing assessment authorities, to develop national standards and a shared database with the longer-term objective of providing a Canada-wide equivalency assessment of professional qualifications which would be accepted in each province and territory.

4.6 Landed Immigrant Status

In recent decades, the world economy has undergone a great deal of change. It is not uncommon for business people to spend considerable amounts of time in other countries during the course of their careers, or for other individuals to undertake studies or short-term work assignments abroad. Being an immigrant to Canada should not mean that a person must give up all flexibility in these areas. On the other hand, particularly given the very considerable package of rights and privileges "landed immigrant" status provides, it is reasonable for Canada to expect a serious degree of commitment in return. The status concerned, leading as it does to the possibility of applying for citizenship, must never become an empty term.

Throughout the report, we have used the term "landed immigrant" rather than "permanent resident" to reinforce the fact that the status can be lost under a number of circumstances, and that its "permanency" is a privilege, not a right.

We have heard from many sources that the current system of Returning Resident Permits and evaluation of "intent" by visa officers and adjudicators is inefficient, is not based on objective criteria, and often leads to travel difficulties for genuine residents. On the other hand, it often encourages the abuse of our travel documents by those who are not genuine residents.

We have also heard about permanent residents who leave Canada for a number of years, return claiming to be visitors at ports of entry, and then stay on as permanent residents. It is virtually impossible, under the current system, to detect this type of fraud.

We believe it is best to give recent immigrants a good deal of flexibility in their early years in Canada as they make the transition from their home country. We need not require them to continually visit our offices in Canada or abroad to have their "intent" assessed. (The residency flexibility we suggest here stands intentionally in contrast to more demanding residency requirements for those seeking citizenship.) At the same time, it is reasonable to expect these immigrants to gradually assume primary physical residence in Canada if they wish to enjoy the privileges which the status of landed immigrant provides. If they choose not to do so, in full knowledge that they will thereby forfeit their status, they will, of course, have committed no crime. But they will no longer be landed immigrants, and Canada should feel no compunction about removing this status from those who consciously choose, for whatever reason, not to live here. After the introduction of such a system, the use of landed immigrant status should be monitored to evaluate whether there is large-scale abuse of the flexibility provided.

We prefer that landed immigrants become citizens. But for those who, for whatever reason, choose not to, we recommend that the legislation create a renewable landed immigrant identification document. This document would be required for landed immigrants wishing to return to Canada after being abroad. A single, secure identification document should be provided to every landed immigrant at no additional charge. For an additional fee, the document should be renewable, every three years, for those who meet residency requirements but who, for whatever reason, opt not to take out Canadian citizenship. Landed immigrants would not need to renew their document unless and until they intend to travel outside of Canada.

RECOMMENDATION 29

The Immigration and Citizenship Act should provide for a landed immigrant identification document which would serve as proof of landed immigrant status. In the case of travel abroad, this document would be required to re-enter Canada as a landed immigrant. The document should be valid for three years following initial landing. At the end of the three-year period, immigrants could either apply for citizenship or renewal of the document for an additional three years, provided they meet certain criteria.

RECOMMENDATION 30

The criteria for the maintenance of landed immigrant status should include 1) the demonstration of physical residency in Canada equivalent to at least one year during the initial three-year period following landing; and 2) the filing of Canadian income tax returns for each of the three years following landing. All immigrants should be advised in writing of this renewal requirement upon initial landing. Following the initial period, the requirement should be the need to demonstrate physical residency in Canada for at least two of the preceding three years and the filing of income tax returns for each of the three years. Immigrants not able to prove their residency would be deemed to have lost their status.

4.7 Developing New Criteria for Citizenship

We have heard general concern about what is perceived to be the devaluation of Canadian citizenship; the requirements for citizenship are perceived to no longer reflect any obligations to the country or to promote integration into Canadian society. To achieve greater social cohesion through integration and to place a higher value on citizenship, it is necessary to identify immigration criteria which in fact reflect Canadian core values and principles in more practical terms.

Sears and Hughes,[5] in their study of citizenship education across Canada, found that the current concept of citizenship is becoming a more activist one requiring citizens to be more informed, responsible, and committed to citizen participation in the public sphere of politics and in the private sphere of community, home and family. We accept this definition and add those obligations that arise out of citizenship and that should apply as much to citizens by birth as to immigrants. These obligations are residency, respect for and compliance with Canadian law, and knowledge of at least one official language, reflecting a person's ability to be an informed participant in a democracy. We have also added a requirement for active participation to demonstrate that an individual has achieved a degree of integration into the Canadian community.

As the Standing Committee on Citizenship and Immigration indicated in its report, *Canadian Citizenship: A Sense of Belonging,* "residency is not a mathematical exercise. Residency is an experience, a Canadian experience, for which there can be no substitute."[6] We wish to encourage immigrants to work and raise their families here, to become part of the Canadian fabric. We want to encourage them to become citizens. One aspect of their commitment must be physical residence here. The very privileges accorded by provincial policy and the *Canadian Charter of Rights and Freedoms* are surely founded on the premise that the individual concerned is *present.* Another aspect must be paying one's fair share of the cost of public services.

We believe, as did the Standing Committee, that the requirements of residency should be objective and fair. The goal of objectivity would be met by a simple three-year minimum residency requirement, and the goal of fairness would be met by applying the criteria across the board to everyone. Our recommendation would merely delay obtaining Canadian citizenship until such time as the applicant could satisfy the residency requirements.

Knowledge of an official language was seen as critical to the integration process. We believe that basic facility in an official language, or an attempt to learn one, starts the process of belonging and of interacting with other Canadians.

We therefore propose the following *mandatory* requirements for citizenship:

Physical Residence: We would require three years of residence in Canada before applying for citizenship. This would be verified by the signatures of three guarantors (similar to the passport application process) and confirmed by T4 slips, telephone bills,

5 Alan Sears and Andrew Hughes, "Citizenship Education and Current Educational Reform," *Canadian Journal of Education* vol. 21, no. 2 (1996), 127-129.

6 Standing Committee on Citizenship and Immigration, *Canadian Citizenship: A Sense of Belonging* (Ottawa: House of Commons, June 1994), 12.

credit card bills, or other documentation. The burden of proof of residence would be on the applicant.

Fiscal Responsibility: Applicants for citizenship would have to demonstrate that they have filed income tax returns and that they were not in contravention of the *Income Tax Act.*

Knowledge of Canada and of an Official Language: The current citizenship test to demonstrate knowledge of Canada should be retained. In addition, the applicant should also demonstrate an adequate knowledge of at least one official language.

Age: An applicant must be at least 18 years old, to be verified by a birth certificate or sworn affidavit.

No Serious Criminality: Applicants would have to demonstrate that they are in compliance with Canadian laws (including the *Immigration Act*), to be verified by police and immigration officials. An individual subject to a deportation order or a security certificate would not be eligible for citizenship.

In addition to these five mandatory criteria, we propose a sixth, which would demonstrate active participation in Canadian society. In our proposal, we try to recognize various forms of life experience to avoid gender and other biases.

Active Participation: The applicant for citizenship would have to demonstrate at least two of the following conditions:

a) **Employment:** Currently employed in Canada or self-supporting, to be verified by employer statements or company records.

b) **Study:** Attendance at an approved school, college or university, including for language studies purposes, to be confirmed by the institution.

c) **Community Service:** Volunteer service in the community, to be certified by three persons who know the applicant.

d) **Family Care:** Full-time responsibility for the care of at least one dependent relative in Canada, to be confirmed by household records and/or community, religious or education officials.

RECOMMENDATION 31

The Immigration and Citizenship Act should include criteria for granting citizenship which demonstrate both personal suitability and active participation in Canadian society, including:

- **Physical residence (three years' residence);**
- **Fiscal responsibility (conformance with *Income Tax Act*);**
- **Knowledge of Canada and of an official language;**
- **Minimum age (18 and over);**
- **No serious criminality (including violations of *Immigration Act*); and**
- **Active participation (at least two of the following: employment, study, volunteer/community service, family care).**

4.8 Other Citizenship Issues

In our consultations across the country, we heard concerns about the abuse of the provision of the Citizenship Act granting automatic citizenship to children born on Canadian soil. We have heard about women who come to Canada as visitors solely to give birth and ensure Canadian citizenship for their children. Unfortunately, there are currently no statistics on the number of children born in Canada to non-citizens or non-landed immigrants.

We have also heard a great deal of concern about children born abroad of Canadian citizens who have no connection to Canada but who have a right to Canadian citizenship. The government currently has no estimate of how large this population is.

The government should collect data, study the real effects, and determine whether current policy should be changed.

Chapter 5

The Family: Essential for Success

5.1 The Importance of Family in Immigration

"The family," states the United Nations' Universal Declaration of Human Rights, "is the natural and fundamental unit of society and is entitled to protection by society and the State." The principle of family reunification that has long been an underpinning of Canadian immigration — and was at times violated, to Canada's shame — must continue to serve as a touchstone for measuring the success or failure of our collective endeavour.

The family is paradoxically both the repository of the individual's most intimate acts and emotions, and an essential building block of community, society and State. It is the meeting point of the Canadian public's great and abiding respect for self-reliance and its treasuring of compassion leading to collective responsibility. Our conviction is that the State owes the family not only protection, but nourishment. By serving the family, the State serves its own best interests. The involuntary separation of individuals from those family members they hold most dear is therefore something the State should seek always to alleviate, never to exacerbate.

Yet, how this principle should be translated into immigration law, regulation and program design is by no means evident because family is at the juncture of the private and public realms. Family matters are often State matters. This has been the case in immigration since at least the 19th century, when female immigration was assisted to provide wives for a disproportionately male population. From the time the first official regulatory structures for immigration were put in place following the First World War, preference to those persons sponsored by close family members has been part of Canadian immigration policy.

5.2 Defining Family

During our discussions and consultations, and in the written submissions we received, we often encountered two apparently opposing views on what constitutes family. One view held that immigration law should interpret "family" according to what is usually described as the "Canadian" or "traditional" model. Those expressing this view usually felt that the *status quo,* or even more restrictive provisions, should prevail. Family reunification should apply only to a Canadian's legal, opposite-sex spouse, their young children and, possibly, their parents. A second view held that an inclusive, culturally sensitive definition was required to prevent newcomers from being separated from those crucial to their well-being. Proponents of this view generally saw the definition of family embedded in current law as ethnocentric and discriminatory.

We believe that these conflicting views present a false dichotomy. The latter view tends to downplay the fact that the nuclear family as the focal point of emotional, economic and cultural dependency is far from a recent Western European invention, but a notion pervasive throughout the world, and throughout the history of human society. While various cultures place greater or lesser emphasis on the extended family, which includes other relatives, the unit of intimate partners, often with minor children, is the core of virtually all societies. Extended families have also always been important to Canadians of all extractions. By the same token, common-law relationships were not unusual, and were even recognized for some legal purposes at various times and places in European history, and in certain non-European societies. Same-sex couples are a reality. Most families of *all* cultural backgrounds have in their lineage such phenomena as *de facto* parents, illegitimate children unofficially adopted, and dependent relatives living within the household for any number of reasons.

That this is a reality is not new. What is new is the degree to which these phenomena apply to the family in Canada. The 1996 census figures show that nearly 12% of all Canadian families consist of common-law couples (a 50% increase in one decade), and that nearly half of these common-law families have children living in the household.[1] What is also new is the emerging conviction of more and more Canadians that to deny these realities is inconsistent with our values of fair play, consistency and equality of treatment. We share this conviction.

1 Statistics Canada, "1996 Census Data," *Daily* (October 14, 1997).

The current *Immigration Act* sets out to define the degrees of relationship that can serve as a basis for sponsorship within the Family Class; the class then operates on the basis of these categories. Attempts have been made over the years to modify these definitions to suit new policy goals, often to regulate the size of the overall movement. Attempts have also been made to define "exceptional" situations, such as orphaned siblings and "last remaining family members," sometimes in regulations, sometimes in the less public realm of administrative guidelines. We prefer that family reunification be achieved on a functional rather than a purely categorical basis.

Our approach is consistent with statements of the Supreme Court, which has held that "it is the social utility of families that we all recognize, not any one proper form that the family must assume."[2] In a minority opinion in the *Mossop* decision, Justice Claire L'Heureux-Dubé went further and questioned the "unexamined consensus"[3] that the "traditional family" of two parents and their dependent children is uniquely valuable. She wrote: "Single-parent families, especially mother-led, are prevalent; an increasing number of parents never marry; divorce is common, as is remarriage; significant numbers of families are comprised of a husband and wife with no children at home; lesbians and homosexuals establish long-term and committed relationships ... Non-traditional families may equally advance true family values."[4]

Thus, it is not for government to manage such particulars; individuals best understand where their emotional priorities lie, and consequently what constitutes their family.

(i) "Spouse" Redefined

In light of the privileges accorded to sponsors of spouses and dependent children, we consider it essential that the current prohibition on marriages of convenience, undertaken "primarily for the purpose of gaining admission to Canada ... and not with the intention of residing permanently with the other spouse" be maintained. We also believe that the definition of spouse used throughout the immigration program should continue to exclude bigamy.

It is equally important, however, that the current definitions of spouse — which we consider badly out of date — and of dependent child — which is complex and difficult to administer — be revisited. These new definitions would apply in all immigration programs.

The defining principle in using the term "spouse" must be emotional dependency as demonstrated through cohabitation. The less stringent sponsorship requirements for the first tier of the new Family Class, outlined later in this chapter, are based on our conviction that involuntary separation from one's most intimate family members constitutes an emotional hardship. We continue to use the term "spouse" to talk of one's intimate partner, "husband" or "wife," but the concept underlying that term must evolve in immigration law just as it has been evolving in both Canadian society and Canadian family law. It is not simply a question of "modernization." In various times and places, societies have had modes of creating and dissolving intimate unions at odds with the practice of the current *Immigration Act,* which describes marriage as a "legal" marriage, and a "spouse" as someone of the opposite sex.

While departmental guidelines are beginning to provide for more sensitive treatment of immigrants in common-law and same-sex unions, applicants are reliant upon the less than uniform application of unpublicized administrative directives. The goal should be transparency, fairness and equality of treatment, and these must be enshrined in law. The notion of spouse should take into account the emotional dependency demonstrated by cohabitation. Other countries, including the United Kingdom, Denmark and New Zealand, are moving in this direction. The effective discrimination against homosexuals and lesbians in the current legislation should be relegated to history.

2 *Canada v. Mossop* [1993] 1 S.C.R. 554.

3 *Ibid.,* L'Heureux-Dubé J. (dissenting), 623.

4 *Ibid.,* 627-628.

RECOMMENDATION 32

For the purposes of the Immigration and Citizenship Act, "spouse" should be defined as 1) a partner through a marriage legal in the jurisdiction in which it occurred or, 2) a partner in an intimate relationship, including cohabitation of at least one year in duration, with the burden of proof resting on the applicant in either case.

(ii) "Dependent child" Redefined

The concept of dependent child has been the subject of much regulation in recent years. In 1988, the Family Class was effectively expanded to include all "never-married" children. Since this could and did include a large number of effectively independent children with common-law spouses and children of their own, it gradually came to be seen as contrary to the program's intent. The changes were effectively reversed by regulations that came into effect in 1992.

The current definition of dependent child involves questions of age, mental and physical disability, educational status, financial dependency, and the duration of any interruption in education. We heard frequently that this definition was difficult to administer, that it occasionally led to educational enrolment for the purpose of circumventing the *Immigration Act,* and that it could produce anomalous results. For example, a 28-year-old doctoral student might meet the definition, while a 20-year-old undergraduate might not because of an interruption in studies to perform compulsory military service.

It is our view that there is no single age and no single regulatory regime that will accurately reflect all situations of dependency. However, by age 21, most children will have completed their basic education and discharged any obligatory military service in their home country, and will be in a position of inter-dependency, or independence *vis-à-vis* their parents rather than one of simple dependency. By and large, in Canadian society, children are remaining dependent to a somewhat older age. We believe that the definition of dependent child should reflect this reality, and that it should be simple and easy to administer. Unless dependent for reasons of physical or mental disability, most older children who are dependent will still be in school. We have designed the third tier of the Family Class, described later in this chapter, to allow for the sponsoring of such children once the family is well established in Canada. We believe the program we propose will enable most families to remain, or become, united with older children whom they consider dependent, if it is a sufficiently high priority for them.

Related to the question of dependent child are those provisions of the current Act dealing with international adoptions. Currently, officers abroad are asked to assess the *bona fides* of such adoptions in terms of whether the adoption will create "a genuine relationship of parent and child." While we do not wish to make an explicit recommendation in this regard, in keeping with the principle articulated elsewhere in this report that immigration legislation be consistent with those international conventions to which Canada is a signatory, we believe the department should study the impact of the use of the "best interests of the child" criterion prescribed by the Hague Convention on Intercountry Adoption.

RECOMMENDATION 33

The definition of a dependent child in the Immigration and Citizenship Act should be that the child has never married and is under 22 years of age, unless dependent for reasons of physical or mental disability.

5.3 Responsibility for Support and Integration

Along with a flexible definition of family, it must be clear who is responsible for the support and integration of immigrants whose admission is based on their tie to a landed immigrant or citizen of Canada. The principle of sponsorship has been a feature of Canadian immigration since the 1950s. The link to Canada for this type of immigrant is the family; thus, the first basis of support should be the family. Canadians wish to be realistic about which costs and strains the social network can bear, and about who should bear them. Just as the government should not dictate all, neither can it provide for all needs.

In keeping with this principle, family members should be encouraged to acquire official language skills before coming to Canada. Prospective immigrants aged six and over should have their language skills

evaluated by a standardized test. Those lacking basic proficiency should be required to pay a fee reflecting the cost of basic language instruction in Canada.

RECOMMENDATION 34

The requirements of the new Family Class should reflect the principles that 1) the definition of family is evolving over time and differs among cultural and ethnic communities; and that 2) responsibility for the support and integration of each immigrant in this class should rest primarily with the Canadian citizen or landed immigrant undertaking the sponsorship. The legislation should, to the extent possible, permit sponsors to define family.

RECOMMENDATION 35

A tuition fee reflecting the cost of basic language training in Canada should be required of all sponsored Family Class immigrants who are six years of age or older and have not achieved a basic knowledge of English or French as measured by standardized tests.

(i) Sponsorship: A Serious Commitment

Sponsored immigrants do not simply live "in Canada." They live in municipalities and provinces, jurisdictions responsible for delivering many of the social services used by new arrivals. The costs of these services escalate dramatically if sponsorship obligations are not met.

Although reliable data are just beginning to emerge, it is clear that sponsorship breakdown is a serious concern in many regions. One study suggests default is as high as 14% in the Toronto region. An examination of all 1994 income tax records indicates that only three years after arrival, sponsored parents and grandparents are using welfare at a rate of 20%, more than double the usage rate of all tax filers.[5] This offends Canadians who insist on fairness and accountability, and thus threatens public support for these essential programs. Cities receiving large numbers of immigrants must cope with the strain exerted on their classrooms by the lack of official language skills — and the lack of adequately funded language training. It is therefore essential that sponsorships be enforceable, and that in cases of breakdown, the money paid out in social services be recovered.

The available data do not reveal the reasons behind the sponsorship breakdown. Detailed research and analysis, including a study comparing default rates for sponsorships approved after appeal, are essential in this area.

Once an effective system for enforcing sponsorships is in place, the advantages of allowing co-sponsors to assist in providing financial support seem evident.

The government should ensure that those incurring new responsibilities by offering support to immigrants, have first fulfilled any prior legal obligations to former spouses and/or dependent children.

The federal government must discharge its role as administrator of the sponsorship program more effectively. While the mechanisms for recovering monies owed to provinces as a result of sponsorship default might best be addressed through negotiation at the Federal-Provincial Council, we suggest that the federal government consider accepting liability for all costs incurred, as evidence of its determination to enforce sponsorship. Expenses could be recouped through such mechanisms as garnishment, using the model of the Justice Department's mechanism for recovering child support payments. Until such monies have been recovered, defaulting sponsors should be strictly excluded from sponsoring again. All sponsors, including sponsors of very close family members, must clearly demonstrate their ability to support themselves in Canadian society.

As some of our recommendations are likely to lead to new patterns of immigration, and new patterns of settlement success or failure, we consider it all the more important that Citizenship and Immigration Canada improve its ability to monitor the outcomes of these programs, and adjust them accordingly.

5 Derrick Thomas, *The Social Welfare Implications of Immigrant Family Sponsorship Default: An Analysis of Data from the Census Metropolitan Area of Toronto: Final Report* (Ottawa: Citizenship and Immigration Canada, 1996), 42.

RECOMMENDATION 36

The integrity of the sponsorship system should be preserved by ensuring that those in default are not eligible to sponsor again until the social assistance debt incurred is settled to the satisfaction of the province concerned. Citizenship and Immigration Canada should be empowered to facilitate the province's recovery of monies owed through such tools as garnishment and seizure of assets. Financial co-guarantors should be permitted; however, the consequences for default should be applied equally to any such co-guarantor.

RECOMMENDATION 37

Sponsors of spouses and dependent children should be required to commit to a three-year undertaking and should not have been on welfare during the preceding 12 months. Sponsors of other members of the Family Class should be required to commit to a 10-year undertaking and to have declared income, during the preceding tax year, equivalent to the applicable Statistics Canada low-income cut-off figure, or other appropriate cost-of-living measure, for themselves, their current dependants, and the number of persons they wish to sponsor. The sponsorship obligation for a fiancé(e) should be reduced to three years following marriage.

RECOMMENDATION 38

Citizenship and Immigration Canada should take the steps necessary to compile post-landing data providing a complete picture of the settlement success or failure of all components of the Family Class, and a complete inventory of sponsorship breakdown with sufficient information to accurately identify indicators of risk. This ongoing data collection and analysis should guide any future changes to this program.

RECOMMENDATION 39

The sponsorship undertaking should include a declaration that the sponsor is not in default of alimony or child-support orders, and the sponsor's permission for the department to undertake whatever checks it requires to verify this information. Potential sponsors in default of such payments should be prohibited from sponsoring.

5.4 Structure of a New Family Class

We propose to divide the Family Class into three broad groupings, reflecting the varying degrees of emotional intimacy and dependency found in family relationships, and the varying degrees of difficulty in settlement and integration. (See Table 5.1 at the end of this chapter.)

(i) Family Class, Tier One

The first tier should include those in the most intimate family core: spouses and dependent children. A number of submissions said that, given the roles of emotional well-being and household viability in attaining self-sufficiency, ensuring that Canadians are not separated from their intimate partners and their dependent children is crucial. The arriving immigrant is apt to enhance the integration of the entire unit rather than pose an integration problem. Nevertheless, we believe most Canadians no longer accept that someone who is not self-supporting should be entitled to sponsor additional immigrants. Sponsorship, even in this first tier, cannot be automatic.

(ii) Family Class, Tier Two

Tier two should consist of fiancé(e)s, parents and, when a sponsor's parents are deceased, grandparents. Many new Canadians wish to sponsor their parents or grandparents to live in Canada. Often, these relatives provide needed assistance of various kinds to the family and often, sponsors will wish to support their parents in their old age in return for all their parents have done for them in earlier years. We believe they should be able to continue to do so.

At the same time, Canada's is an ageing population, and its social services and health networks are facing ongoing retrenchment. We therefore believe that the sponsorship of elderly close relatives needs to be accompanied by measures designed to ensure long-term financial support, and we encourage those arriving to actively participate in Canadian society. Firm data demonstrate that the use of welfare by sponsored parents and grandparents is high, rising rather than falling over time, and reaching rates close to four times that of the general population.[6] Limitations on the sponsoring of grandparents, facilitation and self-financing of basic language training,

and rigorously enforced sponsorship obligations are therefore crucial to the program we envision.

(iii) Family Class, Tier Three

Many individuals form strong emotional bonds with persons who are not their intimate partners or spouses, nor their biological parents, nor even blood relatives. More to the point, some people will be willing to demonstrate the importance of these other bonds by making a long-term financial commitment to assist the arrival, establishment and integration of these individuals into the Canadian community and economy. We believe that permitting such sponsorships can only contribute to our goal of strengthening the role of the family in its many forms as a primary unit of self-sufficiency and security. And strengthening the family can only strengthen Canada. This, the third tier of the new Family Class, will, with certain minimal restrictions on education and a strong incentive to become proficient[7] in an official language at the sponsor's or applicant's expense, permit sponsors to decide who is most important to them, and who is part of what they consider family in the broadest sense. This could even include a best friend.

We wish to emphasize the flexibility that such an approach to the Family Class can bring to our immigration system. It allows other programs to be streamlined by greatly enhancing the possibility for those now excluded to come to Canada through the front door. Thus, the roles played by an alphabet soup of current programs — some enshrined in law, others operating in more nebulous zones of policy guidelines — can now be fulfilled through this single, straightforward mechanism of third-tier Family Class sponsorship.

Many cases now treated under humanitarian and compassionate guidelines could be dealt with in this way, as could many cases of "over-age dependants," "last remaining family members," "family business job offers," "self-employed workers," *de facto* parents, and so on. All of these very real, human situations require either a plethora of regulations in ultimately fruitless attempts to define them, or a wide range of discretion, with its ensuing problems of subjectivity, inconsistency, lack of transparency and administrative inefficiency. They could be solved by a simple provision allowing the immigration of individuals to whom a Canadian is prepared to make a long-term, enforceable sponsorship commitment.

The U.S. Commission on Immigration Reform, in its recent report, cited a study carried out by the U.S. National Research Council which found that: "The difference in estimated lifetime fiscal effects of immigrants by education is striking: immigrants with a high school education or more are found to be net contributors, while those without a high school degree continue to be net costs to taxpayers throughout their lifetime."[8] Given the performance of less educated immigrants, we believe that requiring a completed secondary school education is amply justified.

Likewise, it is just as crucial for the Family Class as it is for the Self-supporting Class that immigrants arriving without the basic language skills necessary to attend school in English or French or to function in society, have access to language training, and that the immigrants themselves, or their sponsors, assume the costs of such training.

RECOMMENDATION 40

The Immigration and Citizenship Act should create a three-tier structure for the new Family Class, composed of 1) spouses and dependent children; 2) fiancé(e)s, parents and (if the sponsor's parents are deceased) grandparents; and 3) relatives or close personal acquaintances of the sponsor's choice, excluding a spouse.

6 Citizenship and Immigration Canada, *Preliminary Profile of Immigrants Landed in Canada over the 1980 to 1994 Period.* Distributed at CERF-CIC Conference on Immigration, Employment and the Economy, Richmond, British Columbia: October 17-18, 1997, 13.

7 The term *proficient* is used here to indicate labour market readiness.

8 U.S. Commission on Immigration Reform, *Being an American: Immigration and Immigrant Policy* (Washington, D.C.: U.S. Commission on Immigration Reform, September 1997), 20.

RECOMMENDATION 41

The Immigration and Citizenship Act should provide that tier three sponsors be required to demonstrate that the individual they are sponsoring is known and emotionally important to them. Principal applicants in this category should be required to have successfully completed secondary school, and either be proficient in English or French, or pay a language tuition fee reflecting the cost of language training in Canada to achieve proficiency.

5.5 Domestic Violence

Sponsorship is one area of policy where provisions must be made to ensure effective — not simply technical — equality between the sexes, by addressing problems to which women are particularly vulnerable. Because of the legal consequences of sponsorship breakdown for both parties envisioned by our program, this undertaking can be used as an instrument of threat or intimidation in an abusive relationship. Some immigrants are reluctant to leave abusive relationships because of the possible effect on their immigration status. Similarly, sponsors may find themselves in an abusive relationship, yet remain responsible for providing shelter. To protect the integrity of the sponsorship system, and to protect individuals against unfounded accusations, more than a simple declaration that the relationship is abusive would be required.

Yet, the actual conviction of the abusing spouse seems an excessive hurdle to cancel the effect of sponsorship. Certainly, there may be cases of *prima facie* evidence of abandonment or abuse which should provide sufficient grounds even though they have not resulted in a criminal trial. We must ensure that it is the abuser, not the victim, who suffers enforcement action under the Immigration and Citizenship Act. In this context, Quebec's experience with the principle of historical record of abuse is pertinent.

Sponsored immigrants and their sponsors need to be informed from the beginning that formal applications for relief from sponsorship are available, and where such applications should be directed. We discuss this process in greater detail in Chapter 9.

We suggest that, upon review, relief from sponsorship obligations should be granted on a balance of probability based on an historical record of abuse or desertion, including such documentation as police or medical records, resort by the applicant to social services such as women's shelters and counselling, and other written or oral testimony. The person against whom the allegations are made should be provided with the opportunity to refute them.

RECOMMENDATION 42

Relief from sponsorship obligations should be considered on grounds of physical or psychological abuse. An abused or coerced spouse who has co-signed an undertaking to sponsor an immigrant should be able to apply formally for relief from the obligations of the joint undertaking. Sponsored immigrants, or the sponsor or guardian of a sponsored dependent child, could also apply to have the sponsorship agreement terminated. In the absence of a decision, obligations should be deemed ongoing.

RECOMMENDATION 43

Anyone convicted of crimes involving spousal abuse or domestic violence should be ineligible to sponsor until a period of five years has elapsed and satisfactory evidence of rehabilitation has been provided.

5.6 A Case for Transparency: Processing and Statutory Requirements in the Family Class

Returning to our principle that the State should always seek to curtail, rather than prolong, the separation of its residents from those they hold most dear, we commented that this benchmark should be pursued most vigorously with first-tier members of the new Family Class — the spouses and dependent children of Canadians. Current procedures for treating the applications of these individuals lack transparency and consistency, offend the most basic sense of fair play, and serve to keep families apart for long periods of time rather than making their reunion one of our highest priorities.

Those who follow the instructions in Citizenship and Immigration Canada's published materials in order to sponsor spouses and dependent children will mail an application for the undertaking to the central processing centre within Canada. Once this is approved, the responsible mission abroad is advised, and applications for permanent residence are mailed. A further 11 months pass, on average, before 80%[9] of the cases are completed and the visas are issued. Often, from the time sponsorship procedures are initiated until the spouse arrives in Canada, at least a year has elapsed.

Other sponsors know, through immigration lawyers, consultants or other sources, that if their spouse succeeds in entering Canada as a visitor (by misleading a visa officer or appearing at a port of entry), an application for permanent residence processed within Canada will almost certainly be approved (94% of the time in 1996) on humanitarian and compassionate grounds. Thus, the family will be together during processing. Those who follow the department's instructions are effectively deceived. The department's administrative guidelines directing staff to "normally" approve such cases on humanitarian and compassionate grounds are perhaps not in direct contradiction to the current legislation, but certainly sit in uneasy relation to it. What is clear is that individuals making similar applications are not treated equally. To further add to the confusion, the department asks "sponsors" to submit undertakings for those being processed within Canada on humanitarian grounds. The legal basis for doing so is questionable, and may increase the difficulty of enforcing sponsorships.

In recent years, the same use of the humanitarian and compassionate provisions of the Act has been accorded to parents and grandparents of Canadian "sponsors" (an 86% approval rate in 1996). As with spouses, this provision is available to those who know how the system "really" works rather than how it is represented in the department's publications. However, in the case of parents, the routine use of humanitarian grounds to approve in-Canada processing is not even mentioned in departmental administrative guidelines. Again, in practical terms, a special class of immigrants eligible for processing within Canada has been created without public consultation, debate, or parliamentary oversight. In the case of parents, those who are not "in the know" and dutifully remain abroad while their applications are processed wait even longer to be reunited with family in Canada (20 months to complete 80% of cases).

The classes of immigrants which should be exempted from the general provision that applications are to be made outside Canada is a question for public policy, law and regulation. The large-scale use of undefined "compassionate" grounds is inappropriate. "Compassion" is subjective and will be interpreted differently in different situations. We discuss this issue in more detail in our chapter on "residual powers" (Chapter 10). More important, Canadians and their relatives deserve to know what the rules are, and the rationale behind them. It is for Parliament to decide which cases should be processed within Canada and which should not; it is for Citizenship and Immigration Canada to facilitate the procedure in the former instance, and enforce the law in the latter. Transparency and accountability are crucial, otherwise public debate becomes a sham.

The case for permitting members of the core family unit (that is, tier one) to apply within Canada is compelling. Their presence is crucial to the emotional, and often economic, well-being of thousands of Canadians. The question of non-bona fide relationships is an enforcement issue, as is the matter of those (relatively few) cases where spouses prove in the end to be inadmissible for reasons of criminality. Visa officers at our overseas offices, and immigration officers at our ports of entry, still have the means to refuse admission to those who are, *prima facie,* inadmissible. The suggestion that such provisions represent an untenable risk is not convincing: over 10,000 cases a year are currently processed in this way, well over one-third of spousal cases worldwide. We need to regularize, and facilitate, in law what has become current practice. There are compelling public policy reasons for doing so.

We view the situation for parents and grandparents very differently. There is rarely the sort of primary emotional dependency between independent adults living in Canada and their parents living abroad that one finds between a husband and wife, or a parent and a young child. Few countries accord such an

9 Processing times and approval rates obtained from Citizenship and Immigration Canada (Field Operations Support System: FOSS).

extraordinary privilege to the parents of adult residents. Most countries are far more restrictive than Canada, if they grant permanent status to parents at all. In addition, under our recommendation 45, parents will remain subject to the "excessive costs on health or social services" provisions of the present law, for obvious reasons. Fewer than one in 10 applications worldwide are currently being processed from within Canada. Final approval of a parent's application for permanent residence is by no means routine: almost one in five is currently refused. While we continue to provide the opportunity for financially capable Canadian citizens and residents to bring their parents to Canada, and while we hope current processing times can be reduced, we find no compelling grounds — either of a public interest or of a humanitarian nature — to exempt the second tier of the new Family Class from the general requirement to make their application abroad. Applications from these individuals should not be accepted within Canada.

RECOMMENDATION 44

The Immigration and Citizenship Act should provide that spouses and dependent children for whom a sponsorship undertaking has been approved be permitted to apply for landing within Canada. Citizens of countries requiring visas to enter Canada should, under the same circumstances, be eligible for provisional status visas for the purpose of completing their application in Canada. Applications made in Canada by persons without legal status in Canada should not be processed.

We also believe that the medical inadmissibility provisions, and their administration, should be simplified. Currently, all members of the Family Class are subject to the provisions that their admission should not cause excessive demands on health and social services, and that they should not pose a danger to public health. However, all such refusals in the Family Class are subject to appeal to the Immigration and Refugee Board, appeals which may be granted either on the basis of errors in law or in fact, or on humanitarian and compassionate grounds.

While the Canadian public must clearly continue to be protected from contagious disease, the excessive cost provision applied to spouses and dependent children is, in our view, inhumane, slow and expensive to administer, and has little practical result. After a lengthy period involving medical examination, a need for further tests, referral to Ottawa, opportunities to provide new medical data, eventual refusal and appeal (a total period often requiring many months, even years), a large percentage of refusals of spouses is either overturned on humanitarian grounds or admission is facilitated through a Minister's Permit.

This outcome, if not the procedures, makes sense: few Canadians would accept that the government separate them permanently from their new wife or new husband, or their six-year-old child, on the grounds that they are deaf and mute, or developed cancer or a heart condition. In many of these cases, a federal tribunal is making decisions affecting a provincial jurisdiction. The result is that after much time, much emotional distress and much expense, the applicant ends up living in Canada.

In the case of parents and grandparents, given the different degree of emotional dependency discussed earlier and the inevitable health problems associated with ageing, we would also wish to simplify matters. These applicants should continue to be subject to the excessive cost provision. However, a medical refusal should be final, unless there are errors of law or fact. We feel that the combination of these two measures will streamline operations and eliminate long periods of uncertainty for applicants, without leading to an increased burden on the health system.

RECOMMENDATION 45

The Immigration and Citizenship Act should exempt sponsored spouses and dependent children from the excessive cost component of the medical inadmissibility provisions.

RECOMMENDATION 46

The Immigration and Citizenship Act should provide that reviews of refusals based on excessive cost provisions for members of tier two of the Family Class be restricted to questions of fact, law, or mixed fact and law.

Table 5.1 Summary of Requirements — Family Class

REQUIREMENTS	FAMILY CLASS (FC)		
	FC 1 Spouse and Dependent Children	FC 2 Parents, Fiancé(e)s	FC 3 Others
1. **Official Language Skills*** Proficiency			○
Basic proficiency	○**	○	
2. **Education** Complete secondary school, meeting Canadian equivalency test			●
3. **Criminality and Security Screening**	●	●	●
4a) **Medical Screening: Excessive Cost**		●	●
4b) **Medical Screening: Public Health and Safety**	●	●	●
5a) **Settlement Arrangements: 3-year sponsorship** Sponsor must not have been on welfare during previous 12 months	●		
5b) **Settlement Arrangements: 10-year sponsorship** Sponsor must meet LICO criteria		●	●

* The terms used are intended to reflect labour market readiness ("proficiency") and a basic ability to function socially ("basic proficiency"), and are drawn from the Canadian language benchmarks developed by Citizenship and Immigration Canada.

** Government loans would be available to assist in paying language fees for those demonstrating financial need (Family Class, Tier One, only).

KEY

● requirement must be met

○ requirement may be offset by paying language-training fee

Chapter 6

Broadening Canada's Economic Base: Self-supporting Immigrants

6.1 The New Global Market and Canada's Need for Human Capital

The movement towards a global economy has altered the nature of demand for human capital. Once blocked by both structural and institutional barriers, individuals now seek maximum return for their knowledge, skills and experience, as well as for their accumulated financial resources. Countries (and even large multinational corporations) are competing globally to attract people who can contribute to economic development and growth. This global competition has exposed the shortage of highly skilled workers, crucial to the expansion of vital economic sectors.

Once heavily dependent on resource-based industries, the Canadian economy is being rapidly transformed into one that is highly reliant for growth on "knowledge industries." This shift, in response to world pressures, has created a number of serious challenges to existing systems and programs. For example, the speed of change in the labour market has made it difficult to perform meaningful labour market analysis. By the time studies are completed, conditions have changed and opportunities have vanished.

Education systems, essentially designed for the long term, cannot produce sufficient numbers of highly skilled workers to meet the needs of information technology and other high-skill industries. Recent estimates suggest that the current shortage of information technology workers in Canada will double in the next five years from 20,000 to 40,000.

Higher salaries and other incentives continue to attract some of our highly skilled workers to the United States (the so-called "brain drain"). Our ability to counteract such flows is constrained by the need to maintain a course of fiscal restraint to restore confidence in our national economy. One approach by the federal government has been the devolution of responsibilities for human resources to the provinces, to expand the effort to build and attract human capital while reducing costs.

Attracting suitable economic immigrants can play a major part in filling specific skill shortages, encouraging investment in Canadian companies, creating new jobs, and increasing our international competitiveness. To make this happen, we must address certain program efficiency and effectiveness factors, such as the speed and quality of service provided to potential immigrants; the provision of accurate, up-to-date information about Canadian opportunities; and the rules and regulations affecting business mobility.

6.2 Economic Immigration Policy in Canada — A Fifty-Year Perspective

Immigration policy in Canada over the past half century has fluctuated between short-term and long-term planning goals. Successive governments have tended to respond to economic upturns and downturns by turning the economic immigration tap on and off at regular intervals, but generally only after such cycles became evident.

While economic immigration was usually considered to be a benefit to Canada, a good deal of policy was based more on intuition than on the level of performance data which is now available.

The preliminary information from the recently released Longitudinal Immigration Database (IMDB) indicates that over the long term, employment earnings of economic immigrants far exceed the Canadian average. The superior performance of economic immigrants is primarily attributable to the skilled-worker movement — those immigrants specifically selected for their skills who, after eight to ten years in Canada, are earning well above the Canadian norm.

The economic immigration program has attempted to meet a mixed set of economic objectives:

- to increase the size of our domestic market;
- to improve the structure of our economy;
- to fill any labour shortages that might exist (particularly relevant after the Second World War);
- to ensure job creation and retention (for Canadians); and
- to attract financing for risky small businesses.

In 1947, the government of Prime Minister Mackenzie King adopted a highly interventionist role in an attempt to maintain full employment and to stabilize economic cycles. Two separate departments — Citizenship and Immigration, and Labour — took opposite points of view, one based on the long-term

impacts of population growth, and the other on short-term factors such as job vacancies[1].

The short-term perspective prevailed when the departments merged as the Department of Manpower and Immigration in 1966[2]. The economic points test was introduced in 1967; microeconomic factors such as occupational demand, the specific educational and vocational preparation of applicants, and the availability of arranged employment took precedence. Extra points were assigned for specific occupations where labour shortages existed. The points assigned to specific occupations were under constant review and changed as new information became available[3].

The *Immigration Act* tied economic immigration to two objectives:

- to facilitate the entry of visitors into Canada for the purposes of trade and commerce; and
- to foster the development of a strong and viable economy and the prosperity of all regions in Canada.

These objectives were developed at a time when the worldwide supply of immigrants was increasing rapidly. At the same time, traditional receiving countries were becoming more restrictive. Regulations were used in an effort to target economic immigrants to Canada more selectively. For example, when it became evident that people whose skills were less in demand were qualifying, a 10-point penalty was introduced for those without arranged employment. Eventually, occupational demand ratings were set at zero for selected workers and assisted relatives as a means of reducing the intake of economic immigrants. This effectively shifted the focus of immigration intake towards the Family Class.

By 1985, however, with the recession abating, immigration policy shifted once again to a longer-term approach to counter an ageing population and to increase population growth. The ban on admissions without pre-arranged employment was lifted, and from 1985 to 1987, the number of economic immigrants almost doubled (from 83,402 to 152,098)[4]. Self-employed persons and entrepreneurs received additional points, and an investor class was introduced in 1986.

The economic downturn of the early 1990s resulted in a reversal of policy once again. Designated occupations were re-established in 1991. However, in 1993, the government introduced a target for annual immigration of up to one per cent of the Canadian population, subject to "absorptive capacity." This was the first time that a government had allowed for the possibility of increased immigration, even during a time of high unemployment, suggesting that the longer-term benefits of economic immigration outweighed the attraction of trying to micro-manage the economy by simply controlling the numbers.

6.3 Towards a New Model for Economic Immigration

For economic immigrants, the policy model should be one that maximizes the long-term potential and benefits for Canada while at the same time minimizing any short-term costs associated with their establishment in Canada. To achieve this, we believe that the selection criteria for economic immigrants should stress attributes which evidence a high degree of self-sufficiency.

Further, the model should be one that focuses on the selection of immigrants who will be able and willing to make a beneficial economic contribution to Canada. The criteria for selection should be transparent and easily understood, and should discourage prospective applicants from expending energy and resources to "beat the system." The model should also show a clear path for those prospective immigrants who

1 Freda Hawkins, *Canada and Immigration: Public Policy and Public Concern* (Montreal: McGill-Queen's University Press, 1972), 111-114.

2 *Ibid.*, 151.

3 Alan Green and David Green, *The Economic Goals of Canada's Immigration Policy, Past and Present* (Burnaby, B.C.: RIIM Working Paper Series, 1996), 4.

4 *Ibid.*, 23.

currently fall short of the requirements yet wish to become eligible.

The following are the key objectives which should be the foundation for Canada's economic immigration program:

Prosperity: Increasing economic benefits to Canada through the creation of employment and wealth.

Stability: Using economic immigration as a long-term tool to smooth out variations in the markets for labour and capital, and for goods and services.

Competitiveness: Raising the level of skills and resources of our pool of human capital to ensure our ability to sell goods and services internationally.

New Technology: Attributing value to technological knowledge as an important factor of economic growth.

Global Investment: Removing the obstacles and barriers to attracting global capital required to develop new products and services to ensure growth and expansion.

Modern Pioneers: Identifying the individuals with a high degree of self-sufficiency who will contribute to Canada's future economic success.

6.4 Permanent versus Temporary Economic Immigrants

As the system presently operates, economic immigration can be divided into two distinct streams, each with several component groups:

- Permanent
  Skilled workers and business immigrants (including the present categories of self-employed, investors, and entrepreneurs).
- Temporary
  Visitors, temporary workers, students, and live-in caregivers.

These streams are not in competition but, in fact, reflect the difference between short-term and long-term requirements for human and investment capital. In the case of permanent economic immigrants, we are selecting persons who will make a continuing contribution to the Canadian economy as both producers and consumers. In the temporary stream, we are admitting persons who will consume and/or produce Canadian goods and services over a specific period of time. The streams are complementary and contribute to the overall economic well-being of Canadians.

We will examine the details of each of these streams and make recommendations that simplify the system while remaining faithful to the key objectives we have laid out in the previous section. We will deal first with the permanent stream and then with the temporary stream. We see a need for closer links between these two streams, and we include several recommendations with respect to making it easier to move from the temporary economic stream to the permanent one.

6.5 Permanent Economic Immigrants

(i) Problems with the Current Selection System

Except for the business immigration component introduced in the 1980s, the current selection system for economic immigrants has changed little since the creation of the first objective points test in 1967. It is a system based heavily on a government assessment of general employability in Canada of persons with relevant qualifications through a General Occupations List (GOL) managed by Human Resources Development Canada (HRDC).

Virtually every organization and individual with whom we consulted felt that the employability estimates of the GOL were open to question in terms of their accuracy and reliability. The occupational demand concept does not take into account the fluidity of the current labour market, the significant regional variations that exist, and the fact that the skill set required by a profession or trade does not necessarily reflect the potential of the individual to settle well and to find employment. The labour market environment requires immigrants to have the flexibility to work in several different occupations during their working life. In fact, many immigrants may never work in their previous occupations once they come to Canada.

One of the messages we received during our consultations was the overwhelming importance of official language ability when considering the qualities required to succeed in such an environment. Yet the current system attaches only modest importance to

this requirement, and one can qualify as an independent immigrant with a relatively low level of competence in either official language.

Another problem with a selection system tied to an applicant's occupation is that it presupposes that the skills and qualifications of successful applicants will be recognized once they immigrate to Canada. Given provincial responsibilities for education and training standards in Canada, we do not have, and it is unlikely that we would be able to create, a national authority with responsibility for assessing the skills and qualifications of prospective immigrants. (This issue was discussed in more detail in Chapter 4.) As a result, many skilled immigrants experience difficulties in gaining access to trades and professions in Canada, even though they have been accepted on the basis of those very skills and qualifications.

(ii) A New Model for Selecting Economic Immigrants

We want to move away from tying the requirements to occupation. We consider that the focus should be on selecting immigrants with the qualities needed to succeed in Canada over the long term. We propose to replace the existing system, which has produced an artificial, complex and overlapping set of criteria, with a system guided by simplicity, transparency, fairness and administrative efficiency. A major concern is that the system be simple to administer without continuous reference to the courts. Applicants should not have to rely on immigration lawyers or consultants to determine their likelihood of success or to navigate their way through the application process.

In developing a new model, we consider that the selection criteria should be:

- fewer in number;
- objective;
- generally verifiable without interviews;
- not able to be manipulated to include inadmissible persons;
- attainable over time by motivated persons;
- linked less closely to occupation and more to the ability to be self-supporting;
- more demanding, with higher minimum standards; and
- less restrictive, with no arbitrary list of excluded occupations.

We found a good deal of consensus among those we met and in the submissions we received regarding the qualities desirable in economic immigrants. The key qualities which would indicate the ability to succeed and contribute to Canada's economic prosperity can be summarized as:

- a high level of education;
- skills likely to be recognized in Canada;
- competence in at least one official language;
- varied work experience;
- relative youth;
- business/entrepreneurial skills;
- economic ties to Canada (schooling, work experience);
- knowledge of Canada (including employment conditions); and
- self-sufficiency (funds for settlement in Canada).

The selection system would be simplified by giving weight to attributes which can be demonstrated empirically. These include factors such as educational attainment, work experience, job offers, the results of standard language tests, and funds available for settlement in Canada.

While we recognize that there may be merit in more subjective notions such as "personal suitability," they are difficult to define and by their nature diminish the transparency and fairness of the decision-making process. It is important to identify objective measures for the qualities we are seeking.

One of the harsh realities of the current fiscal situation is that, however desirable it might be, interviewing all economic immigrants is not the best use of scarce resources, especially when there are insufficient resources to manage other parts of the program that are crucial to its overall integrity, such as enforcement.

While under the current system economic immigrants are required to pass a points test, the bonus points received by applicants who meet the definitions of self-employed persons, investors and entrepreneurs are such that they need not do well with respect to education, work experience, official language ability,

or age. The statistics on investors and entrepreneurs in Annex 5 highlight this weakness.

(iii) New Selection Criteria for Self-supporting Immigrants

Table 6.1 at the end of this chapter sets out the greatly simplified selection criteria we recommend for economic immigrants. We propose that what is currently referred to fairly broadly as the Independent Class be named the Self-supporting Class. This term encapsulates what Canadians expect of this stream of immigration — characteristics such as self-reliance and resourcefulness, an ability to contribute, and an appreciation that entitlements such as social welfare should be used as a last resort. In essence, we are recommending that the current skilled worker, entrepreneur and investor categories be merged into a single class with distinct but more closely linked tiers. All economic applicants would have to meet minimum requirements or core standards with respect to education, official language ability and self-sufficiency. We also propose various other criteria such as age, skilled work or business experience or an offer of employment, or a financial commitment, as additional criteria for the different tiers.

Under our proposal, there would no longer be a points test. All applicants who meet the core standards would qualify. In Chapter 2, we explained our views on how the flow of immigrants qualifying under this proposed system would be regulated. We will examine each of the core standards in turn and provide the rationale for their inclusion.

1. Education

Under the model we propose, self-supporting immigrants would be selected for the generic skills they possess, in recognition of the fact that the labour market is constantly evolving and that it is impossible to predict with certainty the exact skill sets required at any point in time. We heard from academic and other sources that general education is a better indicator of long-term flexibility than specific skills.

We are recommending that the core standard be an educational, technical or trade qualification equivalent to at least two years of full-time post-secondary study in Canada. We consider that the threshold needs to be high enough to disqualify a person who has not been able to complete a post-secondary program, but low enough that it does not exclude technical occupations and trades. It is important to stress that this is the minimum standard, and that many successful applicants will exceed the standard. The standard would apply equally to all tiers of the Self-supporting Class other than provincial nominees.

We are also introducing the concept of equivalency on the basis that the only relevance of the educational qualification for immigration purposes is its usefulness in Canada. We discussed equivalency issues in detail in Chapter 4.

2. Official Language Ability

We propose that far greater importance be attached to official language ability. Under the current system, a lack of any ability in either English or French is not an insurmountable obstacle for an independent applicant. In 1996, more than 6% of skilled workers had no knowledge of English or French, and the figures were substantially higher for entrepreneurs (50%) and investors (66%)[5], as highlighted in the tables in Annex 5. Ability in at least one of the official languages is a key determinant of success, in terms of both employment and successful integration. Official language ability is almost a prerequisite for entry to the labour market in Canada, and it mitigates failure if an immigrant with a job offer has to look for another position.

Official language ability can be acquired by a motivated person who wants not only to qualify for immigration to Canada, but to succeed and to participate fully in Canadian society. We therefore propose that no other attribute (such as a job offer or funds for investment) be able to substitute for the lack of this ability.

The core standard for official language ability should be proficiency in at least one of the two official languages. By this, we mean that the immigrant

5 Citizenship and Immigration Canada (Landed Immigrant Data System: LIDS).

should be able to enter the labour market upon arrival with minimal upgrading. We also consider that it is important that official language ability be demonstrated through an internationally accepted language test. Given the importance of this requirement, the decision should not be based on a subjective assessment by a visa officer who may not even have the opportunity to interview the applicant.

3. Work or Business Experience

We consider that work experience in a skilled occupation should be a core standard for skilled workers. Without a certain level of work experience, there is no objective way of determining whether educational achievements will prove to be transferable to the labour market either in the country of origin or in Canada. Entrepreneurs, like skilled workers, will also require experience to qualify under our proposed system; in their case, the skills to be measured relate to running a successful business.

4. Age

We have selected a maximum age of 45 as the core standard because it represents the approximate midpoint in the working life of most skilled workers. If the core standard for age were higher, many Self-supporting Class immigrants could spend more years in retirement than working in Canada.

Many studies have shown that this is a transitional age, after which it becomes increasingly difficult to find employment. A recent study by De Silva finds that it is age more than any other factor which explains the earnings convergence between refugees and those admitted to Canada under the economic class[6].

Our proposal of 45 as the maximum age is higher than some would like to see, but we would expect the vast majority of successful applicants to be in the 21 to 45 age group, as is currently the case. We also favour an exemption from the age requirement where there is an acceptable offer of employment or a financial commitment, so age need not exclude an applicant whose employment prospects are not at issue.

5. Settlement Funds

A key concept of our proposed approach to economic immigration is "self-sufficiency." Economic immigration must be, and must be seen to be, in Canada's interests. Canada should expect economic immigrants to be self-supporting while they establish themselves in Canada. We therefore recommend that minimum levels of settlement funds be established for economic immigrants to ensure that they are able to support themselves and their families during their first six months in Canada without recourse to social welfare. This would not apply to those immigrants with an acceptable job offer. For those without job offers, the Low Income Cut-Off (LICO) figures provided by Statistics Canada and currently used for Family Class sponsorships could provide a figure that is based on objective data relating to minimum living requirements for various sizes of Canadian cities.

Negotiations could be undertaken with the provinces and territories with a view to denying Self-supporting Class immigrants access to welfare during their first six months, other than in truly exceptional circumstances. This would be in line with current economic realities. There is a move towards requiring Canadian citizens and landed immigrants to be more self-sufficient, and this should be reflected in Canada's economic immigration program. As long as we make this requirement very clear to those who are thinking of immigrating to Canada, there should be no cause for complaint.

6 A. De Silva, "Earnings of Immigrant Classes in the Early 1980s in Canada: A Reexamination," *Canadian Public Policy,* Vol. XXIII, no. 2 (1997), 179-199. De Silva writes: "The analysis presented here has major implications for policy. Given that the evidence indicates rapid convergence in earnings and the relative lack of importance of many of the immigrant characteristics reported at landing, it follows that the younger the immigrant at time of landing, the greater the chances of doing well in this country. Hence there is a strong indication that age at landing is probably the single most observable determinant of an immigrant's ultimate success."

RECOMMENDATION 47

The Immigration and Citizenship Act should merge current skilled worker, entrepreneur and investor categories into a single class to be referred to as the Self-supporting Class. All applicants should have to meet minimum requirements (referred to as core standards) with respect to education, official language ability and self-sufficiency. Core standards for age and work/business experience would also apply, but could be offset in specified circumstances with an acceptable offer of employment or a financial commitment. Applicants who meet the core standards should qualify for immigration subject to health, criminality and security requirements.

RECOMMENDATION 48

The core standard for education should be an academic, technical or trade qualification equivalent to at least two years of full-time post-secondary study in Canada.

RECOMMENDATION 49

The core standard for official language ability should be proficiency (meaning a level of fluency sufficient to enter the Canadian labour force) in at least one of the two official languages. This should be demonstrated through formal, standardized testing.

RECOMMENDATION 50

The core standard for work experience should relate to the Self-supporting Class tier under which the applicant is to be considered. For skilled workers, the requirement should be two years' experience in a skilled position. For entrepreneurs, the requirement should be two years' experience operating a successful business. For both tiers, the experience should have been obtained during the three years preceding the application.

RECOMMENDATION 51

The core standard for age should be not less than 21 years of age or more than 45 years of age at the time of application.

RECOMMENDATION 52

The Immigration and Citizenship legislation should require that Self-supporting Class immigrants be willing and able to meet the costs of establishing themselves and their families during their first six months in Canada. The issue of restricting access to provincially managed social welfare programs by persons who have immigrated under the Self-supporting Class should be an item for discussion at the proposed Federal-Provincial Council on Immigration and Protection.

(iv) Selection Criteria for Skilled Workers (Self-supporting Class, Tier One)

Table 6.1 sets out the simplified selection criteria that we would suggest for skilled workers. Skilled workers who do not have an acceptable offer of employment would have to meet each of the five core standards : education, official language ability, skilled work experience, age and self-sufficiency. Education, official language ability and self-sufficiency could not be traded off for other attributes. Inability to meet the core standard for either skilled work experience or age, but not both, could be overcome by an acceptable offer of employment.

1. Skilled Work Experience

With regard to skilled work experience, we have already stressed that we want to move away from a system which is tied to a specific occupation. We feel that the particular occupation(s) in which the applicant has experience should not be the sole determinant of the outcome, as long as the person is "skilled."

At present, the only available tool with which to assess the level of skill in a particular occupation is the National Occupational Classification (NOC) Counselling Handbook. NOC is an occupation and skills reference tool developed and maintained by HRDC. An Employment Training Indicator (ETI) measures the amount of formal education and professional, vocational, apprenticeship, in-plant or on-the-job training necessary to acquire the knowledge base, techniques and skills required for each NOC occupation.

Under the current system, the actual NOC classification is dependent on whether the applicant is both

"qualified" and "genuinely prepared" to work in the proposed occupation in Canada. However, there is presently no empirical basis for an officer to determine whether an applicant is likely to qualify for work in the proposed occupation once in Canada. Hence, there is often no link between the officer's assessment and the actual outcome.

It is our view that the occupational classification should be based solely on the work which the applicant has undertaken during a fixed period prior to making the application for immigration to Canada, not because we expect a successful applicant to work in that occupation in Canada, but because it is a simple, objective measure of whether or not the applicant is a skilled worker.

The required skill level for the core standard for work experience should be linked to the ETI level as described above. The level should be set at a standard associated with skilled employment, but not at a level higher than the core standard for education. The assessing officer would determine the applicant's occupational classification in the NOC and the ETI level for that occupation. If the ETI level were equal to or above the specified standard and the applicant had sufficient experience, the applicant would meet the core standard for skilled work experience.

Recent graduates would be unlikely to meet the core standard for skilled work experience. However, we would allow the employment market to determine the applicability of their skills by allowing for this requirement to be overcome by an acceptable offer of employment.

It will be especially important to ensure that skilled workers receive detailed information about labour market conditions in Canada as well as comprehensive information regarding all requirements for access to trades and professions, and any structural bars on particular occupations. We recommend that all applicants with qualifications and/or experience in regulated trades or professions, especially those which have a mandatory requirement for licensing or registration to practise in Canada, be required to attend an interview. Such applicants should be counselled very carefully about the difficulties they will face in gaining access to such trades and professions. It would be important to explain to such applicants that, if successful, they were being selected on the basis of their generic skills and their ability to adapt in the labour market rather than because their occupations happened to appear on a list.

2. "Excluded" Occupations

Under the current occupation-based system, if a candidate's occupation is not on the General Occupations List (GOL), the application must be refused unless there is a validated offer of employment.

One of the objectives of the GOL has been to ensure that semi-skilled and unskilled persons are unable to qualify under the points test. The employment prospects of semi-skilled and unskilled Canadian citizens and permanent residents are poor and diminishing. Hence, the GOL does not contain such occupations, and they would be precluded under our proposed system through the low ETI factor attributed to such occupations.

However, many of the occupations that have rarely, if ever, appeared on the GOL are highly skilled occupations for which, from time to time, employment opportunities have been relatively strong. For example, there have been, and continue to be, shortages of doctors, dentists and, on occasion, teachers, in some regions. Some of these occupations have restrictive licensing and/or registration practices for foreign-qualified individuals which limit employment opportunities. Yet, the blanket policy of refusing applicants in these occupations applies equally to foreign-born applicants who have obtained their qualifications in Canada.

Simply put, some occupations are excluded from the GOL for political reasons. Some provincial regulatory bodies have not only made it virtually impossible for foreign-trained individuals to meet the licensing/registration requirements, but their associations have also successfully lobbied governments to restrict immigration opportunities for people in those occupations, even when there are known shortages. One of the reasons for this is that shortages have tended to be in remote areas, favoured neither by recent immigrants nor Canadian graduates, and the mobility provision in the Charter of Rights and Freedoms precludes the option of requiring immigrants to remain in remote areas for fixed periods of time after arrival.

We see no reason why skilled applicants should be excluded merely because their skills are in a particular occupation. Applicants currently working in occupations with protectionist regulatory bodies would need to be given very explicit advice about the problems they would face in gaining access to those occupations. They would be told exactly what additional study and/or work experience would be required to gain access to their occupation, and in which related occupations they might be able to work much sooner.

Under our proposal, Canadian doctors, to cite one profession, would certainly face competition from foreign-born doctors, but only if the latter were suitably qualified. Those who were not fully qualified would need to do further study and/or training, or work in a related field, or do something completely different. In fact, such competition already exists in Canada, but the foreign-born persons tend to have immigrated in other classes or through a job offer route. Canadian professionals in other occupations that are not excluded already face such competition, just as they themselves represent competition for their counterparts in other countries as they pursue employment opportunities in the global economy.

There is a need to be more honest about this issue. As we explained in Chapter 4, we also consider that we need to work much more closely with provinces and regulatory bodies to ensure that information is available and that fair, equitable systems are in place to assess the credentials of foreign-born professionals.

RECOMMENDATION 53

Skilled workers should have to meet each of the five core standards of the Self-supporting Class: education, official language ability, skilled work experience, age and self-sufficiency.

RECOMMENDATION 54

The core standard for skilled work experience should be determined by an objective measure such as the Employment Training Indicator of the National Occupational Classification Counselling Handbook.

RECOMMENDATION 55

There should be no excluded occupations.

RECOMMENDATION 56

Skilled workers with qualifications and/or experience in regulated trades or professions, especially those which have a mandatory requirement for licensing or registration to practise in Canada, should be required to attend an interview and receive counselling and information regarding the obstacles they will face in working in their profession or trade in Canada.

(v) Selection Criteria for Skilled Workers with Job Offers (Self-supporting Class, Tier Two)

While we recognize the importance of proven job skills, we also acknowledge the significant value of pre-arranged employment in the successful settlement and integration of a self-supporting immigrant. Skilled immigrants with pre-arranged employment meet short-term labour market needs, whereas those without arranged employment may struggle initially. The current selection system recognizes the value of pre-arranged employment by allocating additional points.

Under our much simpler system of core standards, we do not differentiate between those with and those without arranged employment through the allocation of points. Rather, we propose that an acceptable offer of arranged employment offset a failure to meet either the core standard for skilled work experience or the core standard for age, but not both. Our aim is to enable Canada to attract bright, young graduates with good language skills even if they do not have the requisite work experience. A validated job offer would constitute an acceptable proxy for the demand for the applicant's education and skills in the Canadian labour market. Similarly, an applicant who is unable to meet the core standard for age could prove employment marketability by providing evidence of arranged employment. This provision is especially important given the fact that some of the most highly skilled applicants with arranged employment (e.g. senior executives) might not meet the core standard for age.

In order to ensure that an offer of employment to an applicant in the Self-supporting Class does not prejudice the career opportunities of a Canadian citizen or permanent resident, the prospective employer would be required to follow the same validation procedure as we will outline later for temporary foreign workers.

As labour markets become more fluid and employment offers become more limited in duration, we expect that there will be more opportunities and more demand for workers to move from the temporary to the permanent stream. We do not regard this as a problem as long as the core standards and the operational processes can be harmonized. For example, a temporary worker who lacks the appropriate language ability would have to upgrade that skill to the required level before qualifying for landed immigrant status.

RECOMMENDATION 57

The Immigration and Citizenship Act should provide that an offer of permanent employment could offset an inability to meet the core standard for either skilled work experience or age, but not both.

(vi) Selection Criteria for Entrepreneurs (Self-supporting Class, Tier Three)

We heard a wide range of views on the existing Entrepreneur Program. We received negative views regarding this program from departmental staff at all levels, many recommending the abolition of the program altogether because of a perceived high level of fraud. Others recommended a significant tightening of the existing terms and conditions. Some provincial government officials closely involved with the program continued to support it and cited examples of the significant benefits the program could bring. A number of submissions highlighted the need to be more realistic with respect to the time frame required for entrepreneurs to establish their businesses. There was a strong thread in the submissions that the terms and conditions, as they currently operate, are unrealistic and encourage many entrepreneurs to open any sort of business, with little if any identifiable benefit to the economy, and often in competition with existing small businesses.

Applicants are currently required to provide business plans as evidence that they have the ability to establish, purchase or make a substantial investment in a business in Canada which will make a significant contribution to the Canadian economy and create (or continue) employment in Canada for at least one Canadian citizen or permanent resident. These business plans do not have to be prepared by the applicant, thereby creating an industry for immigration lawyers and consultants, many of whom have perfected the art of preparing business plans in such a way that the definition appears to be met regardless of whether the applicant is a genuine entrepreneur or has any intention of starting a viable business.

There is currently no requirement that entrepreneur applicants actually have business experience. We heard examples of teachers and other employees who had applied successfully under this program. Further, the bonus points allowed for entrepreneurs under the current system mean that most applicants will pass the points test even without post-secondary education or an ability in either official language.

Our proposed solution is to rely on more demanding selection criteria and, by doing so, eliminate the need for terms and conditions. Skilled workers who are currently selected on the basis of their intention to work in a particular occupation are not penalized if they do not do so. Similarly, entrepreneurs should become a subset of a larger class of self-supporting immigrants, with business experience and a capital requirement rather than the skilled work experience requirement which applies to the Skilled Workers tier. Entrepreneurs, like other self-supporting applicants, would need to meet the mandatory core standards for education, official language ability and age. We wish to select entrepreneurs who can and will become active participants in Canadian society, and who can succeed in the labour market should their businesses fail. Entrepreneurs should be required to provide evidence of experience in operating a successful business for at least two years and sufficient capital (in the vicinity of $250,000) to establish a business in Canada.

RECOMMENDATION 58

Entrepreneurs should be required to meet the core standards for education, official language ability and age. They should also have at least two years' experience operating a successful business and sufficient capital both to start a business in Canada and to meet all initial settlement costs.

(vii) Selection Criteria for Investors (Self-supporting Class, Tier Four)

Since its inception in 1986, the Immigrant Investor Program has been a controversial and politically

sensitive element of Canada's immigration program. It is evident that the majority of persons immigrating to Canada under the Immigrant Investor Program are unable to function in either official language and are poorly educated. Further, there is little control over questionable financial arrangements, money laundering, the involvement of organized crime, and funds from illegitimate business activities.

The historical basis of this program is to provide risk capital. However, recent estimates show that there is a current surplus of risk investment in Canada with little real demand, except for very small enterprises just starting up, and many of the submissions we received indicated that most investor immigrant money is risk-averse. As a consequence, there is a perception that instead of attracting risk capital we are merely selling, and thereby devaluing, Canadian citizenship.

Nevertheless, there is strong support for the program from some provinces, which see it as a potential means to stimulate local economies even if the investors and their families eventually settle elsewhere. The only real shortage of capital is being felt by certain provincial governments. The program provides a continuous income stream in a climate of devolution of responsibility to the provinces and cuts to transfer payments.

A departmental analysis shows that the net benefit to an eligible business under the current program has been estimated to be in the order of $20,000 per investor over the five-year period, while the actual cost to the immigrant investor has been estimated to be $97,000 in Quebec and as little as $55,000 in the Northwest Territories and Newfoundland. This does not take account of the social, medical and other costs for which the provinces are responsible. Some provinces have residual concerns, such as the high costs of English-as-a-second-language training and the social impact of those families divided between Canada and the country of origin. As provincial programs become more competitive with each other, the real costs to the investor and the real benefits to the provinces continue to fall.

Our approach to a new Immigrant Investor Program concentrates on immigrants who invest, rather than investors who immigrate. Instead of unconditionally rewarding investors with an immigration visa, we treat the requirement to invest as only part of a broader selection procedure. In our model, investors would have to meet the core standards for education, official language ability and self-sufficiency, but not the core standards for skilled work experience or age. Our rationale is that education and official language ability are the qualities which ultimately facilitate full participation in Canadian society. Table 6.1 highlights the requirements for the Investor tier *vis-à-vis* the other tiers of the Self-supporting Class.

For the investor program, we propose a $500,000 interest-free loan to the federal government for five years. This money would be allocated to the provinces and territories, based on a formula that would be negotiated with them. Rather than being directed only to risk investments, provinces and territories could use their discretion in applying the money to other purposes, including integration and settlement services. The principal would be guaranteed and returned to the investor after the five years. The source of investor funds should be verified more rigorously at the front end, using the RCMP, the Canadian Security Intelligence Service, and/or major accounting or financial services organizations. Costs incurred for this screening would be borne by the applicants. Funds would have to be unencumbered and represent no more than 50% of an applicant's net worth.

The most obvious benefit would be the improvement in the overall quality of investor immigrants. Instead of simply securing a pool of risk capital, Canada would also secure a pool of well-educated immigrants with good language skills. Provinces would have total discretion in allocating money to various programs and services. In essence, they would have an interest-free loan from the investment pool. The pooling of funds and the negotiated distribution formula would prevent the erosion of economic benefits from the program which is occurring because of the current competition between the provinces.

The real cost to the investor would rise substantially to almost $140,000 (using a compound interest rate of 5% a year for five years). The increased economic benefits to the provinces and the mandatory education and official language ability requirements would offset some, although by no means all, of the criticism of "selling citizenship." The proposed changes could significantly reduce the number of persons approved under the program. The focus of

the program would shift from quantity to quality, delivering not only investment funds, but individuals who would contribute actively to Canadian society.

RECOMMENDATION 59

As well as making a specified financial commitment, investor immigrants should have to meet three of the five core standards of the Self-supporting Class: education, official language ability and self-sufficiency. There would be no core standards for skilled work experience or age for applicants in this tier.

RECOMMENDATION 60

A new mechanism should be established which eliminates competition between provinces and territories for investors and maximizes the economic benefits of the Immigrant Investor Program. The mechanism should be a five-year interest-free loan to the federal government. The federal government would distribute the funds to the provinces according to a mutually agreed formula. Provinces would have absolute discretion regarding the use of the funds. The funds would need to be unencumbered, and there would be more thorough front-end checking, at the applicant's expense, of the provenance of funds.

(viii) Self-employed Persons

Under the current system, self-employed persons are applicants who have the intention and the ability to establish or purchase a business in Canada which will create an employment opportunity for themselves and make a significant contribution to the economy or the cultural or artistic life of Canada.

Most of the submissions we received with respect to this category expressed the view that it should be eliminated since it provides a loophole for investors and entrepreneurs who are unable to meet the requirements for those categories.

In our view, self-employed persons should be able to meet the criteria for the Skilled Worker tier (or in some cases the Entrepreneur tier) of the proposed Self-supporting Class if they have the qualities required to succeed in Canada. Self-employed persons applying in the Skilled Worker tier should be required to meet the core standards for education, official language ability, skilled work experience, age and self-sufficiency. While their work experience may not be as an employee, there should be scope for self-employed artisans, a primary target group in this class, to meet the standards. Musicians, artists, carpenters and other applicants for whom this program was designed are working in skilled occupations. If the applicant is not a skilled worker, the Entrepreneur tier would still be available to take account of the applicant's business-related skills. Our proposed system has the flexibility to consider them under either tier.

For self-employed persons who obtain an offer of employment in Canada but fall short of the core standard for official language skills, there would remain the option of coming to Canada as a foreign worker, upgrading their language skills in Canada and, with a permanent offer of employment, applying to remain permanently. We deal with the issue of change of status for foreign workers later in this chapter.

RECOMMENDATION 61

The self-employed category should be eliminated. Self-employed persons wishing to immigrate to Canada should be required to meet the requirements of one of the tiers of the proposed Self-supporting Class.

(ix) Family Business Job Offers and Assisted Relatives

Special guidelines outside the current legislation now exist for the processing of applications for permanent residence in Canada under the family business requirements. These expand the opportunities for family reunification by providing additional points when it can be demonstrated that it is more appropriate for a Canadian citizen or permanent resident to employ a family member than to recruit an employee locally.

The rationale for the provision is that trust exists among family members which is not readily found among those not bound by family ties, and that there is extra commitment from family members to the success of the business venture. The standard employment validation procedures do not take into account this unique aspect of trust.

The submissions we received questioned this concession. Our view is that job offers from family businesses should not be dealt with differently from other types of job offers, and that this concession confuses the

distinction between employment-based immigration, which is economic in nature, and family reunification. We consider that this is more an issue of extended family reunification than economic immigration. We deal with extended family reunification issues extensively in Chapter 5.

An assisted relative is someone, other than a member of the Family Class, who is the uncle or aunt, brother or sister, son or daughter, nephew or niece, or grandson or granddaughter of a Canadian citizen or permanent resident. Assisted relatives receive a small concession under the current points test. This concession makes little practical difference to the majority of potential applicants, and it is our view that such applicants should have to meet the same core standards as other applicants in the proposed Self-supporting Class.

Further, we provide expanded options for family reunion in Chapter 5, which render additional concessions unnecessary. Specifically, our recommendations with respect to Family Class, Tier Three sponsorship provide increased opportunities for sponsorship of extended family members.

RECOMMENDATION 62

The family business job offer and the definition of "assisted relative" should be eliminated.

(x) Selection Criteria for Provincial Nominees (Self-supporting Class, Tier Five)

Our more flexible approach to selection includes the ability for provinces to bring people to their province who might not otherwise meet the criteria. This may be done in cooperation with industry to fill a particular niche in the labour market, through a partnership arrangement with a community organization assisting immigrants from specific backgrounds, or to address specific social and cultural needs.

Immigration is a shared jurisdiction and there should be scope for provinces to determine their own priorities. The key to this idea is that the province, either alone or through community organizations, commits itself to taking care of these immigrants and connecting them with jobs and communities. This program would partially fulfill our idea of the "modern pioneer" — an individual with a high degree of self-sufficiency in whom others have faith regarding a likely contribution to Canada's economic and/or cultural success. There is a potential interprovincial issue since people are mobile and can move from province to province. This issue would have to be addressed to the satisfaction of each province.

In our view, the provincial nomination should exempt the applicant from some or all of the core standards that apply to the other tiers of the Self-supporting Class. While we expect that the sort of immigrants selected under this tier would meet most or all of the core standards, such a consideration would not be mandatory. The only role for the visa office processing such an application would be to ensure that the nominee and accompanying family members are able to meet the standard health, criminality and security requirements.

RECOMMENDATION 63

The Immigration and Citizenship legislation should allow a province or territory to negotiate an arrangement with Citizenship and Immigration Canada to select an individual, or a group of individuals, either independently or through an arrangement with private industry or other organizations, whose entry would benefit the province for social, economic or cultural reasons. An individual nominated under such an arrangement would be required to meet health, criminality, security and other statutory requirements but not necessarily the core standards applying to other Self-supporting Class immigrants. The province would ensure that satisfactory settlement arrangements were in place.

(xi) Accompanying Family Members of Self-supporting Class Immigrants

We frequently heard that the personal qualities of the accompanying family members of economic immigrants are almost as important as those of the principal applicant. Several submissions recommended that some weight be given to these qualities in the selection process, with the main focus on official language ability.

We considered the idea of a selection system which assesses the personal attributes of all members of the family. In theory, it is an excellent idea, as it is the family unit which will settle in Canada rather than just

the individual. Under the current system, visa officers are required to consider the adaptability, motivation, initiative, resourcefulness and other qualities of both the principal applicant and his or her dependants when allocating points for personal suitability. Further, many of the concerns expressed by the provincial officials with whom we met related to the costs associated with providing services, especially language training services, to the families of economic immigrants as opposed to the economic immigrants themselves.

Nevertheless, we decided against recommending such an approach since it would be inconsistent with our overriding objective of developing a system that is simple, transparent and predictable in its outcomes. While such an approach might be practical under a points-test system that can balance positive and negative features, it would not function effectively under the "core standards" approach we are recommending. Further, we would not want to create a situation where a well-qualified applicant could potentially fail to meet the selection requirements because a family member failed to reach the same standards. In the end, we felt that we must focus on the *selection* of individuals and the *settlement* of families.

We wish to focus on the concept of self-sufficiency which we have highlighted as the main attribute we are seeking in all applicants in the economic stream. We have underlined this by recommending that more rigorous standards apply with respect to the settlement funds which Self-supporting Class immigrants should be required to bring to Canada, and we have recommended that federal and provincial authorities discuss the issue of restricting access to social welfare for Self-supporting Class immigrants during their first six months in Canada.

With respect to accompanying family members of Self-supporting Class immigrants, it is our view that they should pay for their initial language training needs. The spouses and school-age children of self-supporting immigrants should be tested to determine whether they have basic skills in one of the official languages. The tests should be objective and age-specific. Those found to lack basic official language skills should be assessed a fee for the language training they would require on arrival.

Language training is a federal-provincial issue. The spouses of economic immigrants are eligible for federally funded language training, but it is a provincial responsibility to provide language training to school-age children through the provincial education system. We consider that self-funding of language training is a fundamental element of self-sufficiency. Collection and distribution of fees would need to be discussed at the Federal-Provincial Council on Immigration and Protection.

The introduction of this requirement should also encourage Self-supporting Class immigrants to ensure that accompanying family members obtain a basic level of English or French before they apply to immigrate to Canada. Immigration is a life decision, and we expect prospective immigrants to be prepared for it. Not only would they save money by doing so but, given the links between language and culture, they would enhance the initial settlement prospects of their families as well.

Our proposal goes to the heart of why we have chosen to refer to the economic/independent class as the Self-supporting Class. It is our view that Canada needs immigrants who are self-sufficient, who will set themselves up in Canada, and who will truly become "modern pioneers."

RECOMMENDATION 64

There should be an objective test, geared to age, for the accompanying family members of Self-supporting Class immigrants (spouses and school-age children) to assess basic proficiency in at least one official language. A supplementary fee should be charged for each such person unable to meet the required standard to offset the future cost of language training.

6.6 Temporary Economic Movement

As we indicated in Section 6.4, there are different groups of people who come to Canada for shorter periods of time as producers and/or consumers of Canadian goods and services. In the sections that follow, we examine four specific groups (foreign workers, live-in caregivers, visitors and students) which complement the objectives and conditions outlined for permanent economic immigrants.

(i) Foreign Workers — The "Canadians First" Approach

First introduced in 1973, Canada's Foreign Worker Program has been characterized by a "Canadians first" approach, meaning that if a Canadian citizen or permanent resident is qualified and available to fill a job opening, a foreign worker is not allowed to take the job.

This "Canadians first" policy is enforced in two ways:

- a foreign worker cannot be employed in Canada without an employment authorization; and
- the visa office must consider the opinion of an officer of the National Employment Service (currently HRDC) that the employer has made reasonable efforts to hire or train a Canadian citizen or permanent resident.

(ii) Foreign Workers — The Need for a New Approach

As we have indicated, a national economy operating in a global economy cannot be totally self-sufficient from a labour standpoint. There is a need to strike a balance between the current or potential attributes of the domestic labour market and the skills and knowledge which must be attracted from abroad for Canadian companies to remain competitive.

Many of the regulations for foreign workers, essentially developed in 1978, are not suitable for today's market place. For example, the line between "business" and "employment" is becoming increasingly blurred, and the traditional employer/employee relationship is less common in a world where more persons are self-employed and where many forms of commerce defy national boundaries.

Attempts to keep pace through the introduction of a complex array of exemptions have resulted in a system that has become arbitrary and often anomalous. We heard much anecdotal evidence about current regulations creating delays and frustration for business persons at ports of entry.

Recent attempts to deal with these problems have, for the most part, been unsuccessful. One report[7] suggested a shift from a "Canadians first" to a "Canada first" approach, shifting the emphasis from the short-term impact on the domestic labour market to the longer-term benefits of the creation of direct and indirect employment. Unfortunately, the report's recommendations have been implemented inconsistently, the regulations remain complex and obtuse, and exemptions from an HRDC validation are either too generic or extremely specific.

Recent staff cuts in both HRDC and Citizenship and Immigration Canada, and the signing of federal-provincial labour market agreements that significantly alter HRDC's local delivery network, have delayed a proposed HRDC/Citizenship and Immigration Canada review of the Foreign Worker Program.

More telling is the department's discussion paper which highlights problems in monitoring, controlling and enforcing the Foreign Worker Program[8]. It cites a 1992 study which suggested that only 25% of people who technically required an employment authorization according to the regulations actually obtained one. In 1996, when 168,713 employment authorizations were issued, only 45,788 involved validation. We understand that roughly 90% of validation requests are approved[9].

In our consultations, we heard three clear messages:

- There should be a fast track to alleviate critical skill shortages in key sectors;
- The requirement for HRDC to provide a case-by-case validation should be reconsidered; and
- New approaches are required to maintain the balance between the needs of employers and opportunities for Canadians to be given access to training and jobs.

7 Employment and Immigration Canada, "Foreign Worker Policy and Program Review," Ottawa, unpublished, March 31, 1993.

8 Citizenship and Immigration Canada, "Foreign Worker Policy Framework: Discussion Paper," Ottawa, unpublished, January 1996, 13.

9 Citizenship and Immigration Canada (Immigration Data System Overseas: IDSO). The figures cited include initial validations (36,792) as well as extensions (8,996).

In developing a new approach to temporary foreign workers, these key factors must be recognized:

- International obligations to remove certain barriers to free trade;
- The benefit for Canada in facilitating the international movement of key business personnel (and investment flows);
- The fluidity of labour markets;
- The parallel flow of Canadian citizens and permanent residents into the international labour market;
- Industry's need for expedited entry of key employees as well as the need for "company-specific" knowledge;
- The fact that companies choose workers because of small differences in qualifications that can lead to substantial differences in the ability to compete[10]; and
- The current global reality that not all positions can be filled through local training programs, and that the jobs of Canadians may depend on such positions being filled.

(iii) Foreign Workers — Shifting the Onus to the Private Sector

In our view, the objective of the Foreign Worker Program should be to facilitate the entry of those who are coming to Canada to benefit the economy, not simply to liberalize entry. The program should focus on the *bona fides* of the employer rather than on extensive labour market testing. The approval process should be streamlined and commercially realistic. There should be a presumption of benefit to Canada based on the inherent cost to a business of bringing in a foreign worker, the transfer of new skills and ideas to the Canadian workforce, and the benefits of facilitating free trade.

There should be a greater onus on companies to take responsibility for their foreign workers, and there should be increased monitoring of the numbers and skill levels of foreign workers coming to Canada each year. We are proposing a major shift in the identification of labour market needs from the government to the private sector. Our new policy would allow certain companies to select foreign workers. These companies would have to have an established business record and provide details of incorporation, tax returns, audited statements and training plans. We propose a process whereby the prospective foreign workers of these companies could apply directly to visa offices abroad and receive decisions within days rather than weeks or months. There would be a minimum time period for employment specified in the regulations.

For the sake of simplicity and transparency, we propose that this provision apply to companies with at least 20 employees. Table 6.2 (on the next page) illustrates that companies with 20 or more employees make up 12.8% of companies established in Canada (124,457). In relative terms, few of these companies are likely to require foreign workers. Nevertheless, companies of this size constitute a significant percentage of those companies seeking validations under the current system[11]. These companies would have the most to lose if their ability to recruit foreign workers was removed because of non-compliance with the undertakings they would be required to provide.

10 Cited as competitive advantage in Demetrios G. Papademetriou, *Employment-based Immigration in the United States: A Review, Analysis, and Critique.* Paper presented to CIC Selection Conference, Ottawa, October 1997, 15.

11 We were unable to obtain data on validations based on the size of the companies seeking validations.

Table 6.2
Establishments by Number of Employees (Ranges)[12]

Employment Range	Establishments		Cumulative Total	
500+	2,360	(0.2%)	2,360	(0.2%)
200-499	5,122	(0.5%)	7,482	(0.7%)
100-199	11,146	(1.1%)	18,628	(1.8%)
50-99	24,793	(2.6%)	43,421	(4.4%)
20-49	81,036	(8.4%)	124,457	(12.8%)
10-19	120,117	(12.4%)	244,574	(25.2%)
5-9	168,710	(17.4%)	413,284	(42.6%)
1-4	556,015	(57.4%)	969,299	(100.0%)

Companies with fewer than 20 employees would still be able to recruit foreign workers, but would be required to obtain validations in accordance with existing arrangements. However, Citizenship and Immigration Canada, in consultation with HRDC, might from time to time lower the ceiling for those nascent industries that are generally small and often require workers with very specific skills on short notice. Further, the department and HRDC should continue to work together to ensure that validation requirements for non-exempt companies are streamlined.

These proposals should not be seen as reducing the commitment to the job security of Canadian citizens and permanent residents. Facilitation at the front end needs to be backed up by rigorous monitoring through a reporting system that would provide data on the compliance of employers with their undertakings. This would enable the government to make informed decisions about non-compliance by individual employers and about the need for specific audits (involving payroll and tax information) on individual employers and, if necessary, the removal of the privilege of employing foreign workers without validation.

RECOMMENDATION 65

The Immigration and Citizenship legislation should exempt companies operating in Canada with 20 or more employees from the requirement to obtain a validation from the National Employment Service in order to sponsor a foreign worker. Foreign workers sponsored by such companies should be able to apply for an employment authorization directly to a Canadian mission abroad.

RECOMMENDATION 66

For companies with fewer than 20 employees, the current validation process should be streamlined.

(iv) Foreign Workers and Short-Term Business Visitors — Streamlining of Procedures

With regard to employment authorizations, we acknowledge that this is a highly intricate area with many reciprocity issues adding layers of complexity. What is needed, however, is a shift away from the control mentality that currently exists to a more open, facilitative approach. The department needs to develop clear principles with respect to employment authorizations, recognizing the changing nature of business and the unlikelihood that persons entering Canada for very short periods would have an adverse impact on the Canadian labour market.

The following are some of the options that should be considered if Canada is to be a more attractive destination for business visitors:

- Specifying that a person seeking to enter Canada for 30 days or less would not require an employment authorization;
- Creating a special business visa category for frequent travellers, including those from visa-exempt countries, which would provide expedited entry for the life of the person's passport. This could be done in a simple way initially (a multiple travel business visa) but could tie in with government initiatives on automated systems at ports of entry using "smart cards," biometrics and other identifiers;

12 Data are for the July-September 1997 quarter and are provided by the Business Register Division, Statistics Canada.

- Designating an officer in each of the department's offices who would act as a direct contact point for all business-related inquiries; and
- Co-locating specialized immigration officers with customs officers at the primary inspection line, possibly with a queue reserved for business persons, so that fewer referrals to secondary inspection would be required.

These options are not meant to be prescriptive or exhaustive. It was not within the scope of our review to examine how a more facilitative approach might be implemented. We believe that a representative committee should be formed to undertake a more comprehensive study of this issue and provide recommendations to the Minister within six months on the operational issues involved in developing a new approach to the issue of short-term business entry.

RECOMMENDATION 67

The Immigration and Citizenship legislation should provide an exemption from the requirement to have an employment authorization for any *bona fide* business person seeking to enter Canada for 30 days or less for legitimate business and/or employment purposes.

RECOMMENDATION 68

The immigration Regulations should provide for a "facilitation" visa which should be available on a full cost-recovery basis in both visa-exempt and non-visa-exempt countries. The visa should be marketed to frequent travellers, especially business persons, who would benefit by having a multiple travel business visa which would facilitate access to Canada and, eventually, provide expedited admission at ports of entry.

RECOMMENDATION 69

A task force of representative parties should be formed to advise the Minister within six months on ways to facilitate the entry of business persons to Canada.

(v) Foreign Workers — Work Entitlements for Family Members

During our consultations, we often heard that Canada should review its restrictive position on work rights for the spouses of foreign workers to make it easier for employers to attract workers with much-needed skills. We heard that Canada's position should be based on competitiveness considerations rather than issues of reciprocity, and that Canadian companies were having difficulty attracting highly skilled foreign workers because of this obstacle. The current restrictions are outdated and potentially counter-productive since they lead to difficulties in obtaining and retaining key personnel.

We concur with the idea of making competitiveness the overriding consideration — this is a new direction for Canada. Reciprocal work entitlements should continue to be pursued for Canadians, and the delinking of Canada's approach to reciprocity may well strengthen rather than weaken our position in that regard.

RECOMMENDATION 70

The Immigration and Citizenship legislation should allow family members of foreign workers to work in Canada.

(vi) Foreign Workers — Health Insurance Coverage

The *Canada Health Act* does not require provinces to provide health coverage to anyone other than Canadian citizens and permanent residents. However, most provinces choose to extend health coverage to foreign workers. The eligibility criteria vary from province to province and have been subject to change in recent years.

Visa officers instruct applicants on the advisability of obtaining health insurance prior to arriving in Canada. However, issuance of an authorization is not delayed pending proof of private health insurance coverage.

We believe that there should be a greater role for employers, the prime beneficiaries of our proposed Foreign Worker Program, to ensure that foreign workers do not become a burden on the public health system. Private health insurance for temporary workers can be prohibitively expensive, and employers may be able to make arrangements with

provincial governments, who are responsible for health coverage, to ensure that foreign workers are covered. Greater employer responsibility for ensuring the health coverage of foreign workers would:

- promote the concept of joint responsibility/partnership with the private sector;
- ensure foreign workers did not represent a potential drain on provincial health care systems; and
- discourage frivolous use of the Foreign Worker Program.

One option would be for employers to sign an undertaking accepting full responsibility for all medical costs incurred by the individual and by any accompanying dependants during the period of proposed employment. This could be a precondition for granting an employment authorization. Alternatively, each province might develop its own arrangements to allow foreign workers access to provincial health coverage. The visa officer would have to be satisfied that arrangements acceptable to the province of intended destination were in place for the duration of the proposed employment. We envisage that this issue would be discussed in more detail at the proposed Federal-Provincial Council on Immigration and Protection.

If such a provision were implemented, it is our view that there would be significant scope to expedite the health clearance procedures for temporary workers. Such applicants are currently treated much in the same way as immigrants — as persons who could potentially cause excessive costs to the health system.

One option would be to introduce a local clearance procedure for temporary workers, especially in low-risk countries. Another option would be to allow urgently needed temporary workers to come to Canada in advance of the final medical clearance. It would be very unlikely that the final medical assessment would be negative, and a mechanism could be created to deal with such cases. With the main threat to public health coming from Canadian citizens, returning residents and visitors (who are not required to undertake any sort of health screening), it should be possible to streamline the process for this group of applicants.

RECOMMENDATION 71

The health coverage of foreign workers and their families should be the responsibility of the employer, either through private health insurance or through an agreement with the provincial government.

RECOMMENDATION 72

Streamlined health clearance arrangements should be introduced for temporary workers. Options to consider include local clearance where designated medical practitioners are satisfied that the applicant is medically admissible, and conditional entry pending the final determination by a medical officer.

(vii) Foreign Workers — Change of Status to Landed Immigrant

Some people who enter Canada as foreign workers will for a variety of reasons (most commonly a permanent job offer) want to become landed immigrants. At present, their only option is to leave Canada and make an application for immigration. For many, this involves a trip to the nearest Canadian office in the United States.

Facilitating landing for such people is in Canada's interest. These workers have Canadian experience. Like other Self-supporting Class applicants, they will qualify only if they meet selection requirements. They have the advantage of a permanent job offer, either with the company that brought them to Canada or with another company, which is a significant bonus in terms of their integration.

We consider that the requirement for foreign workers to apply for landed immigrant status outside Canada is unnecessary and adds no value to the process. Making people cross the border simply to apply for a visa breeds disrespect for the integrity of the system and the law that creates it. Moreover, such an approach lacks transparency and simplicity, which should be the guiding principles of the Act.

RECOMMENDATION 73

The Immigration and Citizenship legislation should allow foreign workers to make applications from within Canada for change of status to landed immigrants. Applicants should be required to meet the same selection criteria and health, criminality and security requirements as other skilled workers, and should have a valid, permanent job offer.

(viii) Foreign Workers — Annual Reporting of Numbers

In an increasingly global labour market, it is no longer realistic to equate permanent residence with physical presence in Canada. Permanent positions may be short-lived, while temporary positions may lead to permanent ones. With less distinction between temporary and permanent positions, there should be less distinction between the two categories in terms of planning and reporting on positions filled through employer sponsorship of foreign workers.

The annual report of the immigration program for the coming year should include details of the numbers of both immigrants and foreign workers. As the foreign worker numbers are demand-driven, the report should focus on the previous year's outcomes.

It will be essential to measure whether the more facilitative approach has any impact on either the overall numbers or the relative skill level of foreign workers in Canada. It will also be important to obtain enhanced information regarding personnel/skill inflows and outflows, recruitment trends and labour market implications.

RECOMMENDATION 74

The annual report on immigration levels should include details of the number of foreign workers from the previous year by occupation group.

(ix) Live-in Caregivers

The Live-in Caregiver Program was introduced in 1992 to meet a labour market shortage in Canada, replacing the Foreign Domestic Movement Program. Like other labour market programs, the validation process requires that the Canada Employment Centre counsellor is satisfied that a reasonable search has been carried out to determine whether there are Canadian citizens or permanent residents available to undertake such work. Unlike other temporary workers, however, live-in caregivers are currently able to change status to landed immigrant without leaving Canada and without meeting skills-based selection criteria.

We heard a variety of concerns about this program, including the preferential treatment accorded to this group with respect to immigration. Some felt that it was a program with very questionable benefits for Canada. On the other hand, one detailed submission on this program recommended that the current requirements be significantly liberalized — removal of the live-in requirement and no temporary period on a work authorization.

Our view is that the Live-in Caregiver Program needs to be made consistent with other foreign worker classes. We should not discriminate either in favour of or against this group. Caregivers should be allowed to live in or live out according to the arrangement they make with their employer.

Many live-in caregivers are qualified in other fields and come to Canada as caregivers in order to qualify for landed immigrant status after two years. By eliminating the General Occupations List, we are in effect removing the requirement that a caregiver must live in Canada for two years before applying for landing. Under the requirements of our proposed Self-supporting Class, a caregiver who meets the core standards for education, official language ability and age could qualify for immigration on the basis of a validated permanent job offer.

RECOMMENDATION 75

The Live-in Caregiver Program should be eliminated as a separate visa class and made, both in theory and in practice, entirely consistent with the Foreign Worker Program. The Immigration and Citizenship legislation should allow caregivers with a valid, permanent job offer to apply for landed immigrant status in the Self-supporting Class.

(x) Visitors

In our consultations and in the submissions, we heard strongly polarized views on the issue of visitors to Canada. One viewpoint sees the need to facilitate the entry of visitors for the purpose of fostering trade and commerce, tourism and family reunion, while protecting the health and safety of Canadian society.

The second view seeks a very restrictive approach because of what are seen as weaknesses in our current refugee determination system.

In reality, the present system for assessing visitor visas has become a *de facto* screening of persons likely to apply for refugee status once in Canada. Advocacy groups argue that the visitor visa system represents a barrier to those genuinely seeking protection and can lead indirectly to *refoulement.* Others suggest that the generous approval rates in the current determination system and difficulties in removing failed refugee claimants act as a magnet for persons wishing a better life in Canada but with no genuine fear of persecution in their home country. Many submissions favour a streamlined refugee determination system and an expanded capacity for removal of illegal aliens, subject to our international human rights obligations. Those favouring such an approach believe that this would serve Canadian economic development interests and require a less robust screening mechanism abroad.

Certain other visitor visa issues also have to be addressed. With respect to placing a country on a visa-exempt list, there should be a more open process for reimposing visa requirements if there is abuse of the visa exemption from nationals of a particular country. One option might be to make all visa exemptions provisional, subject to certain indicators. Any process would have to be clear and easy to manage, and would have to respect Canada's overall foreign policy considerations.

Another important issue is the protection of Canada's health system from the costs incurred when uninsured visitors fall ill, and from fraud. One option might be a universal requirement for travel or health insurance, although this could be problematic for an older person who might not be able to get insurance. It might also be difficult to administer at the port of entry for visa-exempt countries. As the information we have received on this issue is anecdotal, we propose that the above option be referred to the proposed Federal-Provincial Council on Immigration and Protection. The provinces would be in a better position to provide information on whether there really is a significant problem and could propose measures that would not have adverse effects on the tourism industry.

RECOMMENDATION 76

The Immigration and Citizenship Act should state that the placement of any country on a visa-exempt schedule would initially be on a provisional basis only.

RECOMMENDATION 77

The Federal-Provincial Council on Immigration and Protection should consider the need for, and the consequences of, a requirement that all visitors to Canada be covered by a travel or health insurance policy that would cover the costs of any medical treatment incurred during their stay in Canada.

(xi) Students

Most of the submissions and presentations highlighted the need for Canada to take a more coordinated and positive approach to foreign students. The main concerns cited include processing delays, inconsistent treatment, difficulties proving intention to return, and difficulties proving financial support. For many, Canada is slipping behind its main competitors and is missing an excellent opportunity to export its surplus educational capacity to a world market estimated at $35 billion in 1995[13]. As with visitor applications, visa officers are often perceived to be assessing countries rather than individual student applications because of a lack of faith in the refugee determination system. There also appears to be a preoccupation that some students may wish to stay in Canada after completing their studies.

We believe that the question of intention to return is overplayed. As with foreign workers who have Canadian work experience, it is quite likely that some foreign students who have completed their studies in Canada will decide that Canada is where they would like to make their future. In today's world, human capital is mobile, including our own "brain drain" to other countries. Many foreign students who have

13 This figure was cited by several sources, including a submission from the Department of Foreign Affairs and International Trade.

completed their studies in Canada come from countries that have little to offer them in terms of employment opportunities. We can find no rationale for requiring them to leave Canada merely to make an application for immigration. The department's primary role should be to facilitate the entry of those who have been successfully targeted by promotional efforts and who meet the requirements for entry to Canada.

While we are comfortable with facilitating the entry of foreign students who complete post-secondary studies in Canada, we are concerned about children who are sent to Canada to complete primary or secondary studies. First, they may not yet be fully literate in their native language so that they may be unable to function in their own country. Second, if guardianship arrangements are weak or break down, these children can create significant problems for provincial welfare authorities. These young persons may be attracted to gangs or other antisocial or illegal activities. We believe that provincial welfare authorities must be more involved in the approval of guardianship arrangements if the provinces are going to continue to allocate places in primary and secondary schools for foreign students.

We also heard that the health insurance requirements for foreign students vary from province to province. The lack of a comprehensive approach appears to be inconsistent with a program designed primarily to bring financial benefits to Canada. While we have no data which suggest that foreign students represent a drain on the health care system of any province, we nonetheless consider that foreign students should be required to provide evidence of satisfactory health coverage before obtaining their student visa, as is currently the case in Quebec. This is certainly the case for foreign students wishing to study in some of Canada's main competitor countries, with no adverse effect on enrolments. We recognize that the practical implementation of such a requirement would require close consultation with provincial governments through the proposed Federal-Provincial Council on Immigration and Protection.

RECOMMENDATION 78

The department should facilitate the entry of foreign students, with consistent and transparent decisions on an applicant's *bona fides* as a student.

RECOMMENDATION 79

Foreign students should be required to provide evidence of health coverage satisfactory to the relevant provincial authorities before obtaining their student visa.

RECOMMENDATION 80

The Immigration and Citizenship legislation should require evidence of guardianship arrangements satisfactory to provincial welfare authorities prior to the granting of a student visa for primary or secondary school studies in Canada.

RECOMMENDATION 81

The Immigration and Citizenship legislation should allow foreign students who have successfully completed a course of post-secondary studies in Canada to apply for landed immigrant status in Canada if they have an acceptable, permanent job offer. They should be required to meet the selection criteria for the Self-supporting Class as well as health, criminality and security requirements.

Table 6.1 Summary of Selection Criteria: Self-supporting Class (SSC)

SELECTION CRITERIA	SSC 1 Skilled Workers	SSC 2 Employer-designated	SSC 3 Entrepreneurs	SSC 4 Investors	Dependants of SSC 1-4	SSC 5 Provincial Nominees
1. **Official Language Skills*** Proficiency	●	●	●	●		
Basic proficiency					○	
2. **Education** Obtained qualification equivalent to 2 years full-time post-secondary study in Canada	●	●	●	●		
3. **Age** Must be between 21 and 45	●	❊	●			
4. **Professional Experience or Financial Commitment** 2 years at high skill level	●	❊				
2 years operating successful business; capital for start-up in Canada			●			
$500,000 financial commitment				●		
5. **Settlement Arrangements:** Immigrant must have liquid assets equal to 6 months LICO for family size; or be sponsored by community group having agreement with CIC/ province	●		●	●		●

* The terms used are intended to reflect labour-market readiness ("proficiency") and a basic ability to function socially ("basic proficiency"), and are drawn from the Canadian language benchmarks developed by Citizenship and Immigration Canada.

KEY

- ● requirement must be met
- ○ requirement may be offset by paying language-training fee
- ❊ valid job offer overcomes age criteria or work experience, but not both

Chapter 7

Offering Canada's Protection

"Whoever rescues a single life earns as much merit as though he had rescued the entire world."

Talmud, Sanhedrin, 37:a

7.1 Introduction

Canada has in recent decades developed programs for the protection and resettlement of refugees that are justifiably respected throughout the world. But public confidence in the fairness, consistency and efficiency of our programs — particularly with regard to the in-Canada determination of refugee status — is flagging badly. It is time to restore that confidence by devising a system for the next century that will protect those persons in need of our help and screen out those attempting to take advantage of our humanitarian reputation.

Canada must build a role for itself at the forefront of the international community's often wavering commitment to the protection of victims of war, internal conflicts and human rights abuse. In Canada and abroad, we must speak with one voice, use one set of standards, and develop one comprehensive policy framework to reflect those values which Canadians hold most dear.

Lofty goals require programs on the ground that work. We cannot afford to waste scarce protection resources on those who should be applying for our immigration programs. Given the requirements of Canada's Charter of Rights and Freedoms, and the fact that issues of life and death are at stake, combining efficiency with fairness is not a simple task. A system containing every conceivable safeguard would be so expensive and so slow that justice would be rendered to far fewer persons, and with delays that would effectively punish both the genuine and non-genuine claimant, as well as all Canadian taxpayers. On the other hand, a system that is not consistent and fair and that does not rapidly identify those most in need of our protection, will not meet any of our goals. This chapter is about making hard choices. We want to serve the most deserving and deter those who do not require our protection.

7.2 Canada's History of Protection

(i) Overseas Protection

In 1986, the United Nations awarded the people of Canada the Nansen medal, "in recognition of their major and substantial contribution to the cause of refugees." In the previous decade, Canada had granted safe haven to more than 150,000 people from refugee camps, more per capita than any country in the world.

In 1979, Canada played a leading role in organizing and implementing the resettlement of tens of thousands of Vietnamese in the aftermath of a decades-long war, at the same time developing innovative and extremely successful partnerships between government and private groups. Canada demonstrated similar generosity towards Hungarians in 1956, Czechoslovaks in 1968, Chileans and the Asians of Uganda in the early 1970s, Salvadorans, Guatemalans and Somalis in the 1990s, and others. Prior to this period, Canada's reception of refugees was without legal underpinning, not subject to public scrutiny, and often racist: our lamentable record in the face of European Jewry fleeing Hitler's Germany is well known.

As part of its international humanitarian policy, and in order to promote multilateral cooperation and address root causes of mass migration, Canada voluntarily resettles refugees and other displaced persons, and provides an annual contribution of about $18 million to the Office of the United Nations High Commissioner for Refugees. In recent years, Canada has resettled about 10,000 refugees from abroad annually, about one-quarter of those through sponsorships by private groups having agreements with the federal government. More than double this number are accorded refugee status each year within Canada as the result of determinations made by the Convention Refugee Determination Division (CRDD) of the Immigration and Refugee Board (IRB).

(ii) Inland Protection

Canada came to its international obligations fairly recently. In 1969, it became party to the 1951 Convention Relating to the Status of Refugees (the Geneva Convention) and its 1967 Protocol, and in 1995, it signed the Convention Against Torture.

The Geneva Convention obliges Canada to protect persons on its territory who have a well-founded fear of persecution based on their race, religion, nationality, membership in a social group, or political opinion.

A refugee determination procedure was first recognized in Canadian law in the *Immigration Act* of 1976. However, the IRB was not created until 1989 (Bill C-55) principally as a result of a landmark decision of the Supreme Court in 1985[1]. In the *Singh* case, the Court found that where a serious issue of credibility was involved, fundamental justice required that credibility be determined on the basis of a hearing. The Court recognized that although the absence of a hearing was not necessarily inconsistent with fundamental justice in every case, the concern with any procedural scheme was not over the absence of a hearing in and of itself, but over the adequacy of the opportunity the scheme provided for persons to state their case and know the case they had to meet.

To respond to this decision, the CRDD of the IRB was established to provide hearings to those persons in Canada seeking protection under the Convention. The CRDD currently has about 160 members, appointed by Cabinet. The most recent estimate of the backlog is about 29,000 claims.[2]

What was originally a post-war phenomenon of displaced Europeans has now become a global movement of people, some fleeing individual persecution but many seeking long-term solutions for themselves and their families in the wake of ongoing civil war, ethnic genocide, economic or environmental impoverishment, famine and social breakdown. While Europe continues to produce refugees, most of those making claims in Canada in the past 20 years have come from Africa, Asia, the Middle East and Latin America.

7.3 The Current International Context

". . . the West's promiscuous and selective attention span . . ."[3]

The traditional asylum-receiving countries of Western Europe have moved quickly to organize regionally through multilateral arrangements to institute "safe third country" provisions. This terminology is used to refer to laws that limit asylum seekers to requesting protection from that country where they first had an opportunity to seek asylum. The international law dealing with the safe third country notion attempts to establish an orderly system for returning those asylum seekers to the countries concerned. The strongest criticism often repeated about this type of law is that it operates without consideration of the right of the asylum seeker to be protected against *refoulement,* that is, they are sometimes returned to the territories of countries that do not scrupulously adhere to the obligation to protect them from returning to countries where their lives would be endangered.

Since the late 1980s, Western European countries, reacting mostly to the porous borders of the new countries of Eastern Europe, started erecting barriers to deflect refugee claimants from their borders. Both the Schengen and Dublin Conventions stipulate certain criteria, which in essence provide that only one of the states party to these conventions is to be responsible for handling a claim for refugee status. The deflection mechanisms could be summarized as follows: in both conventions, the "responsible state" is the one that first granted a residence permit to the refugee claimant. In the absence of such a permit, responsibility lies with the state that granted a transit visa or, in the absence of such a visa, with the state where the asylum seeker first crossed the external border of the whole Schengen or European Community area. Failing the establishment of these facts, the responsibility lies with the state where the asylum seeker submitted the request.

1 *Singh et al .v. Canada (Minister of Employment and Immigration)* [1985] 1 S.C.R. 177.

2 Auditor General of Canada, "Chapter 25: Citizenship and Immigration Canada and Immigration and Refugee Board — The Processing of Refugee Claims," in *Report of the Auditor General of Canada to the House of Commons* (Ottawa: Minister of Public Works and Government Services Canada, 1997), 12.

3 Michael Ignatieff, "Decline and Fall of a Blue Empire," *Manchester Guardian Weekly,* Oct 27, 1995, 33.

Developments in international law relating to responsibility sharing did not end with the Schengen and Dublin Conventions. The Treaty of Amsterdam signed in October 1997 contains specific provisions for asylum establishing that within five years, the Council of Europe will have to adopt criteria and mechanisms for determining which state is responsible for considering an application for asylum submitted by a third country national in one of the member states. The Treaty of Amsterdam contains a protocol providing that all member states are basically safe countries of origin. A member state can always decide to accept an asylum application.

The purpose of the Schengen and Dublin Conventions and the 1997 Treaty of Amsterdam is to establish all members of the European Union as safe countries of origin, and to accord responsibility for providing asylum to the initial country of residence or transit.

In the last decade, the United States has attempted to make its inland determination systems more objective while simultaneously pursuing aggressive interdiction offshore (Haitians, Cubans).

While some traditional asylum countries have been partially successful in building unilateral and multilateral systems for the "trade" in refugee claimants, efforts to stem forced migration flows, and the human suffering they cause, have by and large met with limited success. Moreover, these efforts to put some order in the routes used by asylum seekers have sometimes overshadowed the central issue of their need for protection from *refoulement*. It has been in the interests of many states to ensure that the large populations living in tenuous situations around the world not be moved from zones of temporary asylum.

In the past dozen years, over five million applications for refugee status were made in Organization for Economic Co-operation and Development (OECD) countries. The number of refugees and other displaced persons worldwide has never been higher: 27 million, by the United Nations High Commissioner for Refugees' 1996 estimate.

7.4 Canada's Response to Large Migration Flows

Canada's policies on refugee determination have not been immune to these developments. In 1989, amendments to the *Immigration Act* included provisions to allow Canada to return refugee claimants to countries where they sojourned prior to arrival in Canada (i.e. safe third country provisions). These provisions have never been proclaimed, requiring as they do a list of safe countries to be prescribed by Cabinet. Such a list was thought to be too difficult to develop since successive governments have been understandably reluctant to name countries where they could not be sure that the treatment of some groups would be fair.

Additional provisions came into effect in 1992 enabling the government to enter into bilateral agreements with other governments for the purpose of sharing the responsibility of determining refugee claims and providing the protection which follows a positive determination. Canada started negotiating an agreement with the United States for sharing the responsibility for refugee seekers. Drafts of the agreement were released to the public in 1995. In March of that year, the Standing Committee on Citizenship and Immigration held hearings on the draft and issued its report in May 1996. The Committee recommended that an ongoing monitoring committee be created, that safeguards be included in the agreement with respect to removal to countries other than Canada or the United States, that the family exception rule be broadened, and that the transit provision of the agreement be reconsidered. Although the two governments had intended to finalize the agreement in 1996, they both decided to defer concluding talks until recent changes to the American asylum law and procedures were implemented. Negotiations have not resumed.

Canada has also responded to the increase in international migration flows through such measures as its network of immigration control officers abroad, its training of airlines to identify false documentation and, at times, the use of visa requirements as a tool for limiting in-Canada refugee claims both by groups having a high percentage of non-genuine claims (Chile) and by those making many successful claims (Sri Lanka, Czech Republic). Canada currently requires nationals of more than a hundred countries to obtain a visa in order to enter the country.

Our current resettlement from abroad program, established under the *Immigration Act,* is designed to select persons who both require protection and are able to demonstrate the basic skills to settle successfully in Canada. Thus, our requirements sometimes deny us the very tools we require to select those in greatest need, by screening them out.

7.5 The Need for a New Approach to Protection

> Industrialized states spend billions of dollars annually to process the claims of the small minority of the world's refugee population that manages... to claim protection in the North. These same wealthy governments contribute less than US $1.2 billion each year to address the needs of the more than 80% of refugees remaining in the South.[4]

Canada and the international community must rethink the reasons people seek asylum and develop appropriate responses. It can no longer be argued that those who find their own way to the frontiers of traditional asylum countries, and those who linger hopelessly in refugee camps awaiting the return of stability in their home countries, are different groups. They are parts of one whole. Those who make it to our shores will not necessarily be the most needy. For example, the majority of people in refugee camps are women and children (by some estimates, 75%, and as high as 90% in some countries[5]); the majority of in-Canada claimants are male. Women who do enter the international people-smuggling systems are particularly vulnerable to physical and sexual abuse.

The asylum "channels" are often used as access points to the asylum territory for other reasons. In recent years in Canada, over half of all asylum-seeking arrivals at ports of entry had destroyed all identification documents before being seen by officials. We are not referring here to the influx of Somalis, most of whom made every effort to cooperate with immigration staff, fleeing a situation of chaos. Recent arrivals have mainly come from countries which are stable enough to provide identification documents. Generally, these individuals are uncooperative and refuse to provide their names, their countries of origin, or anything else that might assist the expeditious processing of their claim. The idea that all such persons are reluctant to give such details because of refugee-based fears, or that the persons helping them enter Canada are latter-day Raoul Wallenbergs, is naive. The people-smuggling business is now as lucrative as the international drug trade.

During our discussions with many individuals involved in the in-Canada refugee determination system, we heard of a number of other emerging trends, many of them leading to a decline in the effectiveness of our programs, and many contributing to a loss of public confidence:

- Closer screening of those wishing to enter Canada, resulting in a growing people-smuggling industry;
- "Asylum shopping," whereby asylum seekers make claims in several countries or shop around for the best approval prospects or best access to employment, welfare, health and education, and other benefits;
- An increase in the number of repeat claims from those outside of Canada for more than three months since their previous, unsuccessful claim;
- Close relatives of Canadians applying for refugee status while visiting Canada in order to speed up family reunion, circumvent sponsorship requirements, or improve economic prospects, leading to increasingly strict controls on visitor visas and thereby effectively punishing many genuine visitors; and
- *De facto* integration of refused asylum seekers by the time they have exhausted all avenues to remain (asylum claim, judicial review, assessment of risk, humanitarian and compassionate application).

4 James C. Hathaway and R. Alexander Neve, "Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-oriented Protection," *Harvard Human Rights Journal,* vol. 10, 1997, 153.

5 Wenona Giles, Helene Moussa and Penny Van Esterik (eds.), *Development and Diaspora: Gender and the Refugee Experience* (Dundas, Ont.: Artemis Enterprises, 1996), 44.

The choice is to do nothing and allow the continued deterioration of a system designed to protect those most vulnerable *or* to create a new protection paradigm that will genuinely protect those in greatest need whether they are abroad or have reached Canadian shores.

7.6 A New Protection Model

No one can deny that much of the world's population needs a better life materially, socially and politically. Our responsibilities as Canadians include improving conditions internationally. With regard to migration, we can work in bilateral, regional and global forums to continue to provide our share of resettlement opportunities while stepping up efforts to find durable solutions. To date, our efforts towards cooperative international solutions and responsibility sharing have been *ad hoc* and mainly unsuccessful. International cooperation is surely a higher goal than the building of ever more elaborate domestic determination systems to deal with those who manage to jump sophisticated hurdles and arrive in our country. Humanitarian resources are not unlimited and must be spent wisely and effectively. As one participant in our consultations lamented, litigation costs alone for refugee determination in Canada could relieve considerably more human suffering if spent abroad on those most in need.

The protection model we propose attempts to take a holistic approach to international protection: first, by encouraging Canada to provide international leadership in building new models of cooperative responsibility sharing; and second, by establishing a single system to manage both in-Canada and overseas refugee and protection programs no longer linked to immigration policies and priorities. A crucial part of this new system would be a single cadre of career Protection Officers who would alternate between Canada and abroad to ensure professional, cost-effective and, most important, consistent decision making.

Our key principle is to select refugees most in need and at locations as close as possible to their home country.

7.7 Establishing a Structure for Protection

(i) International Leadership

Because of its history and its record in humanitarian areas, Canada is able to take a leadership role in the international community. We provide no precise model for a responsibility-sharing system. We know there are discussions in several forums, where regional and international processes are being debated. Canada is well placed to lead these discussions and invite the participation of those non-governmental organizations (NGOs) required to ensure high standards are met.

Canada must lead by example. Legislation must provide the impetus and the means to assume a leadership role in international protection in order to develop international processes based on protection and responsibility-sharing principles.

RECOMMENDATION 82

The Protection Act should enable Canada to exercise leadership in generating international protection-oriented responses to refugee crises.

(ii) A Single System for Protection

> There is no doubt in our minds that we are headed towards an impasse and that an urgent solution must be found. To succeed in this, it seems to us that we must go back to the beginning and try to identify, in today's context, the people and groups that deserve protection, and find the least undesirable way of doing so.[6] [Translated from French]

A long-term move towards a reinvigorated international protection regime based on common but differentiated responsibility is desirable but, to be realistic, it will not solve all the challenges we have outlined. We have to ensure that Canada's own protection system works effectively and efficiently, and that it reflects the priorities that we promote in our role as an international leader.

6 Le Groupe de travail sur les réfugiés, *Vivre ensemble,* vol. 6, no. 22 (Fall 1997), 14.

At the moment, Canada's international protection system is made up of two distinct streams. Currently, a majority of those granted Canada's protection are determined to be refugees through the quasi-judicial process of CRDD. Others are selected abroad by career visa officers through programs developed by the Refugee Division of Citizenship and Immigration Canada.

This bifurcation disguises the true nature of international protection and works against the efficient and effective management of a fair and consistent system of determination. Protection has both domestic and international policy ramifications, requiring consultation and coordination with a number of departments, agencies, provincial and municipal governments, NGOs, international bodies and other states. There is a need to collect better information abroad on emerging protection needs in order to design better protection responses both overseas and inland.

This makes it preferable that one organization be responsible for all aspects of refugee and humanitarian migration policy and program implementation, including the determination process both in Canada and abroad; a common information database (including a possible international database); the sharing of information with other government departments to prevent abuse of social programs; integration measures, assistance services and the provision of information to those seeking asylum; coordination with the Federal-Provincial Council on Immigration and Protection; and research and reporting to identify trends that may bear on future resource requirements.

RECOMMENDATION 83

The Protection Act should provide that all of Canada's protection activities be managed as part of the same system.

(iii) A Single Protection Agency

The protection system should centralize all decisions related to protection in a single body that would encompass both Convention refugee grounds and broader risk assessments. The same criteria would apply in Canada and abroad. We are proposing an independent protection agency to identify those most in need of resettlement from abroad and those already in Canada, who should be afforded Canada's protection.

The protection agency would:

(a) administer the protection process and any other requirements and procedures established by the Protection Act and its Regulations;

(b) provide administrative support for, and comprehensive and ongoing training to, the decision makers. This would include establishing and maintaining systems to ensure that information is collected in a timely fashion before the matter is assessed by the decision makers;

(c) develop and conduct public information programs to foster understanding of the Act and of the activities of the organization;

(d) undertake or sponsor studies, activities or research related to its duties and functions under the Act, or as referred by the Minister;

(e) be the federal point of contact for providing assistance to persons claiming or determined to be in need of protection;

(f) on behalf of the Minister, negotiate agreements:

- with NGOs, for the designation of persons in need of protection overseas and for the settlement of persons determined or designated to be in need of protection;
- with federal, provincial or municipal entities, for coordination, consultation and exchange of information; and for providing for the various needs (such as legal aid, health care, accommodation) of persons determined or designated to be in need of protection; and
- with representatives from other jurisdictions, for the sharing of responsibility for persons claiming to be in need of protection;

(g) develop and maintain a single, comprehensive, plain-language User Guide to assist the decision makers in interpreting the Protection legislation for the purposes of ensuring consistent decision making; and

(h) be responsible for the appropriate resourcing of the protection program.

It is widely agreed that a research and documentation centre, such as the one developed by the CRDD, improves the quality and timeliness of decision making. The protection agency would be responsible for maintaining a research centre with a special focus on generating claimant-specific information. While the research centre would make its holdings available on request to applicants or their representatives in as convenient a way as possible, it would not be its responsibility to proactively furnish applicants or their representatives with copies of generally available published background information.

We acknowledge the legal requirement to ensure the independence of the decision makers in the protection agency. This might be perceived as being more difficult in the context of the system we envisage, which would no longer include Order in Council appointments acting in a quasi-judicial setting. We believe that it is possible to design a protection agency that can be independent as well as sensitive to broader national imperatives. Our vision of the protection agency is that of a structure designed to ensure that its decision makers are free from bias and improper influence as they deal with individual requests for protection.

However, the administration of the workload of the protection agency should be amenable to ministerial directives. The agency would be required to advise the Minister on international trends as well as sudden influxes of protection seekers into Canada. The Minister in turn must be able to direct the agency to deal first with the protection requests of one group over others, whether inland or abroad. The Minister must be in a position to handle crises that affect more than the work of the protection agency. Such directives cannot be seen as affecting the independence of Protection Officers with regard to protection requests placed before them.

RECOMMENDATION 84

The Protection Act should create a protection agency to be responsible for the management of Canada's protection system.

The protection agency should include both Protection Officers and Appeal Officers. They would be career civil servants who, following extensive training, would be professional and expert in refugee and international human rights law and in the procedures for making fair, legally sustainable and consistent decisions on claims for Canada's protection. The Protection Officers would be assigned to work in Canada (at ports of entry and in major cities) or at Canadian points of service abroad. Appeal Officers would be higher-level civil servants with appropriate backgrounds and training in legal and administrative matters, and would be assigned to major offices in Canada.

Abroad, Protection Officers should enjoy full diplomatic immunity and be located as close to refugee populations as security provisions allow. In some areas where there are no Protection Officers, specially trained visa officers might be designated and trained by the agency as Protection Officers, since they often encounter persons requiring Canada's protection.

Officers would normally alternate between in-Canada and overseas assignments to avoid stagnation and to ensure consistency of decision making between the in-Canada and overseas components of the protection mandate. Overseas, Protection Officers would also be responsible for creating and maintaining networks of NGOs and human rights associations.

In our proposed model, Protection Officers and Appeal Officers would be hired for their adaptability and cross-cultural sensitivity, and their ability to make complex decisions. Protection Officers and Appeal Officers should receive ongoing training in topics such as refugee law, human rights law and principles, and the Canadian Charter of Rights and Freedoms. They should also be trained in analytical and decision-making techniques and appropriate ways of responding to the needs of victims of sexual and other forms of abuse and torture, and the needs of children, women, and members of ethnic and religious minorities.

Protection Officers and Appeal Officers should be given the powers of commissioners appointed under Part One of the *Inquiries Act,* such as the power to issue summonses to individuals to appear and produce any document within their control, and the power to administer oaths and to conduct examinations under oath. In addition, Protection Officers should be given the authority to seize documents submitted to the agency.

RECOMMENDATION 85

The protection agency should develop a cadre of career civil servants as Protection Officers and Appeal Officers. The protection agency should assign Protection Officers to determine protection claims both abroad and in Canada, and Appeal Officers to review decisions on in-Canada protection claims.

(iv) A Protection Advisory Committee

The protection agency requires input from more than its own officers to support its activities.

We recommend that a Protection Advisory Committee be created, composed of representatives from various domestic, international, governmental and non-governmental spheres, in order to provide advice to the protection agency. The members would have knowledge or experience relevant to managing the protection program, and should represent the socio-economic and cultural diversity of Canada as well as various professional disciplines. A representative of the Federal-Provincial Council on Immigration and Protection would be appointed as an ex-officio member of the Protection Advisory Committee in recognition of the need for close coordination with immigration policy, and in recognition of the Federal-Provincial Council's interest in such protection-related areas as legal aid and social benefits available to asylum seekers.

The Committee could offer advice on any matter relevant to protection, including proposed changes to the law, guidelines, the budget for the resettlement of persons granted protected status, staff training, and current or emerging trends. This consultative role would not include providing advice to the agency's decision makers on determinations and appeals.

RECOMMENDATION 86

The Protection Act should provide for the creation of an Advisory Committee composed of experts to advise the protection agency.

7.8 More Inclusive Grounds for Protection

We have established that the guiding principle of the system we propose is to shift Canada's priorities in our protection program to those persons in the most vulnerable situations.

The current criteria for selection of refugees from abroad are found in Regulations in the recently developed Humanitarian Designated and Asylum Country Classes. This instrument combines Convention Refugees, the Asylum Country category (persons in a refugee-like situation outside their home country) and the Source Country category (persons in a refugee-like situation inside their home country). Applications are assessed by Canadian visa officers, normally at an interview, taking into consideration the applicant's eligibility (that is, whether or not the applicant meets the category definition of refugee or refugee-like situation), and the likelihood the applicant will be able to adapt successfully to life in Canada. Officers are trained to use a "sliding scale" so that for those in greater need of protection, the ability to adapt becomes a lesser factor. Nevertheless, as one observer has put it, "skill levels that are explicitly used to decide entry for independent immigrants are implicitly present in refugee policy used to define appropriate entrants to Canada."[7] This is not always the case; it is, however, often the case.

Under the current inland regime, we first consider a person's fear of persecution thoroughly and exhaustively. As Canada became party to new international conventions, it became necessary to tack on procedures to take into account how those obligations could be met for each individual case. The result was an imbalance in the resources, time and expertise devoted to the application of these obligations as opposed to applying the refugee definition. Protection of the rights of the child and protection against torture and slavery are as important as protection against persecution based on race, religion and other refugee grounds.

7 Wenona Giles, "Aid Recipients or Citizens?" in Wenona Giles et al. (eds.), in *Development and Diaspora: Gender and the Refugee Experience* (Dundas, Ont.: Artemis Enterprises, 1996), 45.

A recent report by a British group that included JUSTICE (a legal human rights organization), the British Immigration Law Practitioners' Association, and the Asylum Rights Campaign (United Kingdom) made the following observation on protection proceedings in Canada:

> Canada shows the danger of not dealing with all protection needs concurrently. Canadian law provides for three separate and consecutive processes for determining protection needs. Consideration of eligibility for 1951 Convention status is carried out by the independent Immigration and Refugee Board. Refused applicants are automatically [now amended: only on application] reviewed by the Immigration Department in the Post-Determination of Refugee Claimants in Canada (PDRCC) process. This considers whether they face an 'objectively identifiable risk' to life, or of 'extreme sanctions or inhumane treatment,' which are not generally faced by individuals in that country. It is an administrative paper process with no appeal. Those who fail PDRCC may then reapply to the Department for consideration on humanitarian and compassionate grounds.[8]

As mentioned in Chapter 2 on the legislative and accountability framework, the complexity of the current immigration and refugee systems is rooted in the various layers of decision making. This is quite apparent when one examines the number of decisions being made and the variety of criteria used for protection. Although the current protection system includes various safety nets, some of Canada's international obligations, such as those contained in the Convention Against Torture, have not been adequately incorporated into domestic legislation.

The Refugee Convention is only one of a number of international instruments that identify the responsibilities of a country to protect the human rights of individuals seeking admission to or already in the country. We are of the view that decisions should be based only on criteria to assess the need of protection. Under the current system, overseas applicants who meet the protection criteria must also satisfy a visa officer that they are likely to establish themselves successfully in Canada. In our view, this gives priority to the most economically viable of the world's refugee population rather than to those most in need. This violates the guiding principle of the protection system we are proposing, that is, to shift Canada's priorities towards those in the most vulnerable situation. Vulnerable groups, such as women and dependent children, are less likely to meet the current criteria than men.

We believe that the criteria for granting protection should not be limited to the 1951 Convention Relating to the Status of Refugees and that there should be one decision point for protection. We believe that one body of expertise should be developed to handle all of these issues and to do so within the context of a single interview.

At times, the role of the refugee determination system has been the subject of some confusion. The protection system we propose would not, in making its decisions, be assessing whether or not the individual's personal situation is difficult (unless those difficulties are directly related to protection grounds), nor whether the individual has admirable qualities, or might make a good resident of Canada. These are questions for the Immigration and Citizenship Act.

Canada cannot protect every person in the world from every situation. For the protection determination system to be fair, it must have clearly defined and consistent objectives supported by criteria sufficiently broad to meet Canada's international human rights obligations.

Duplication between different decision processes, inconsistency and lengthy delays must be eliminated. Addressing all relevant grounds for protection in a single interview should improve the process and quickly determine whether claimants qualify for Canada's protection. The post-determination refugee claimants in Canada process should be eliminated.

8 JUSTICE, ILPA, ARC, "Providing Protection: Towards Fair and Effective Asylum Procedures – Report and Recommendations from the JUSTICE/ILPA/ARC Asylum Research Project," London, unpublished, July 1997, 22-23.

RECOMMENDATION 87

The Protection Act should provide criteria consistent with Canada's obligations under the 1951 Convention Relating to the Status of Refugees and other current and developing human rights and humanitarian standards, violation of which would result in the endangerment of life and security of a person. These same criteria should be used when examining protection claims both in Canada and abroad. All criteria should be examined in a single administrative procedure.

RECOMMENDATION 88

The protection agency should give priority to the most vulnerable and those most in need. There should be no requirement that applicants be likely to establish themselves successfully in Canada.

7.9 The Overseas Protection Process

(i) Early Focus on Most Vulnerable

Overseas protection is not an obligation, it is voluntary. Until now, we have offered overseas protection for purely humanitarian reasons. We envisage a system that focuses first and foremost on those most in need of protection, and that makes determinations closer to the source of the problem.

The determination process should ensure that an application is dealt with at the first opportunity in the migration continuum — overseas, at port of entry, and in Canada. *Bona fide* protection seekers should be encouraged to come forward as soon as possible, and the protection process should be designed to make it in their best interests to do so.

The overseas protection process would be based on the premise that it is easier and faster to assess the credibility of a claim abroad, given that Protection Officers are *sur place,* are aware of local conditions as part of their responsibility for reporting on humanitarian migration trends, and have established contacts with human rights organizations, other government departments and agencies, other NGOs, and the embassies of other countries having relevant expertise. It would also be based on the concept of close cooperation with NGOs who may assist in referring urgent or needy cases.

RECOMMENDATION 89

The Protection Act should provide conditions to encourage claims for protection to be made at the earliest possible opportunity, which means in the following order: overseas, at the port of entry, inland.

(ii) Selection Arrangements — Governmental and Non-governmental

Given that humanitarian migration patterns may vary, there could be different triggering scenarios. An individual seeking protection might communicate with a Canadian embassy abroad and be referred to the responsible Protection Office; another might be referred by an NGO or an international organization such as the Office of the United Nations High Commissioner for Refugees; a third might be visited by a Protection Officer in a refugee camp; a fourth might be sponsored by a private group in Canada having an agreement with the protection agency; or a fifth might be referred by an immigration control officer.

Canada's history of protection contains numerous instances of working with NGOs, religious communities and others with international experience and presence. We believe that it would be useful to develop real partnerships through negotiated agreements that include accountability provisions. In some cases, the protection agency might enter into an agreement with an NGO that allows a representative of the NGO to make protection determinations. The provision of resettlement assistance in Canada by the NGOs could be part of these agreements, but there may be agreements where NGOs might decide not to be responsible for resettlement.

RECOMMENDATION 90

The Protection Act should contain provisions enabling the protection agency to enter into selection and/or settlement arrangements with non-governmental organizations. Based on the general protection criteria, these organizations could select persons overseas in need of protection.

RECOMMENDATION 91

Protection seekers abroad could be sponsored by the Government of Canada or, in some cases, by non-governmental organizations. Resettlement assistance would be provided by the government, non-governmental organizations, or both.

(iii) Specific Procedures

Because of the nature of some refugee movements, the goal of the protection agency should be to maximize the humanitarian impact of the resources at its disposal. Therefore, in a situation where large numbers of *prima facie* illegitimate claims for protection are being received, the officer would require the flexibility to select cases for formal protection determination interviews. This would necessitate a paper pre-screening of potential claimants. The criterion used would be the need for protection, not resettlement potential.

While counsel will not be provided by the protection agency, the applicant would be permitted to be represented at a protection determination interview by a member of any provincial law society, a member of an association regulated by a province, or a person not remunerated for services rendered.

Protection offices would attempt to provide competent interpreters in the languages common to their area of responsibility. The Protection Officer would be required by regulation to provide a written decision, with reasons, within six weeks of the protection determination interview. There should be no appeal provision for decisions of Protection Officers made outside of Canada because overseas protection is voluntary, not obligatory. Where the Protection Officer or a designated NGO determined that a claim met the protection criteria, the case would be forwarded to the responsible Canadian visa office for processing for landing.

RECOMMENDATION 92

To improve the fairness and efficiency of overseas protection determination procedures, the legislation should provide for the following:

- **the overseas Protection Officer would be authorized to do paper pre-screening of potential claimants;**
- **applicants would be permitted legal representation by a member of any provincial law society, a member of an association regulated by a province, or a person who was not remunerated for services rendered;**
- **a written decision by the Protection Officer, stating reasons, would be required within six weeks of the protection determination interview;**
- **decisions could not be appealed; and**
- **where a claim was allowed, the case would be forwarded to the responsible Canadian visa office for processing for landing.**

Canada is offering not only protection, but also an opportunity to share in the privileges of living in Canada. It would be contrary to the humanitarian intent of our protection programs to turn someone away after having judged them to be in need of protection.

In exceptional instances involving immediate danger, a temporary protection visa could be issued by the appropriate immigration authority so that the individual in need of protection could complete immigration processing within Canada.

RECOMMENDATION 93

The Immigration and Citizenship Act and the Protection Act should allow for persons abroad who are determined to be in urgent need of protection to be issued temporary protected status.

7.10 The Inland Protection Process

Inland, we have international obligations which we are required to meet. The system to be used for determining whether a claimant requires Canada's protection must be simple, efficient and swift, while retaining the principles of fairness, consistency and natural justice. Delays are inhumane both for those whose claims are accepted and those who are

refused. This is a cardinal principle of this chapter. As with the overseas process, *bona fide* protection seekers who are in Canada should be encouraged through the system to come forward as early as possible.

RECOMMENDATION 94

The Protection Act should provide for an inland protection determination system that is fair, consistent and timely and that reflects natural justice. *Bona fide* protection seekers should find it in their best interests to come forward as early as possible.

(i) Safe Third Country Provisions

In our view, it would be naive to believe that Canada can continue to fulfil its international obligations appropriately without adopting a safe third country concept. The likelihood that other countries will drop the use of such sieves is minimal. Canada could become the repository for those asylum seekers frustrated by safe third country bars in countries much closer to the source of the migration flow. Some argue that this should be the role for Canada. We cannot accept this view. We do not believe that this is the way to assure Canadians that Canada is caring for those most in need. It is also not the way to restore the original purpose of international humanitarian law, which was to build systems to ensure that all countries share properly in their responsibilities to provide solutions for those seeking protection.

We propose that the Immigration and Citizenship Act enable the Minister (or Governor in Council) to prescribe which countries are safe third countries not only in relation to a person who is not landed, but also in relation to a class of persons The Immigration and Citizenship Regulations would specify the connection a person would have with the safe third country, such as presence in the country at a particular time or the right to enter and reside in the country. In addition to the consultation process described in the *Statutory Instruments Act,* the Immigration and Citizenship legislation would provide for consultation with the protection agency.

To ensure an open process, the Minister of Citizenship and Immigration would table, before the Standing Committee, the proposed safe third country regulations and a statement on the countries prescribed as safe third countries. The statement would indicate that these countries:

- comply with relevant international law on the protection of persons seeking asylum;
- meet the relevant human rights standards for the persons in relation to whom the country is prescribed as a safe third country;
- are willing to allow any person (in relation to whom the country is prescribed as a safe third country) to go to the country; to remain in the country during the period in which any claim for asylum is determined; and, if the person is determined to be a refugee while in the country, to remain in the country until a durable solution regarding the permanent settlement of the person is found; and
- are party to an agreement with Canada on the sharing of responsibility for examining refugee claims.

Approved regulations and the Minister's statement would be tabled in the House of Commons.

RECOMMENDATION 95

The Immigration and Citizenship Act should enable the Minister to prescribe a country as a safe third country, including in relation to a class of persons. The protection agency would have to be consulted. The proposed regulations and a statement indicating why the proposed country should be considered a safe third country would be submitted to the Standing Committee.

RECOMMENDATION 96

The Immigration and Citizenship Act should provide for the Minister to table before the House of Commons any safe third country regulations and a statement. The statement would include whether the proposed safe third country complies with relevant international law concerning the protection of persons seeking asylum and with other relevant human rights standards.

(ii) Pre-Determination Procedures

In the current legislation, a senior immigration officer must screen each refugee claimant to determine whether or not the claimant is eligible for access to Canada's refugee determination system. Eligible

claimants are referred to the Immigration and Refugee Board for consideration. The Act specifies that a senior immigration officer must find a person ineligible to have a claim considered if that person:

- has been recognized as a Convention refugee by a country to which the person can be returned;
- came to Canada from a safe third country;
- has been determined, in the 90 days preceding the claim, not to be a Convention refugee, or to have abandoned the claim;
- has been determined by an immigration officer not to be eligible; or
- has been determined to be a danger to the public in Canada.

Fewer than 1% of refugee claims are screened out through these eligibility criteria. Hence, the criteria are not currently operating as an efficient sieve.

While we propose to maintain eligibility criteria, we are of the view that the eligibility determination need not precede the referral of the claim to the protection system. In some cases, an eligibility determination can be made upon a claimant's arrival at a port of entry. But in other instances, such as in danger to the public cases, the determination process can take some time. We therefore propose that the requirement for a senior immigration officer to refer a claim to the proposed protection agency be eliminated, and that all claims be automatically referred to the agency, except for the cases mentioned in the next paragraph. This is consistent with our goal of an efficient determination system and the principle of justice delayed being justice denied.

We propose that eligibility determinations be made by a Protection Officer, except when a case can be readily decided at the port of entry. This would cover the cases where a person comes to Canada within a year after being found not to be in need of protection, and where a person comes from a safe third country. These latter determinations would be made by status determination officers (see Chapter 8).

In view of our proposals for greater focus on affording protection, at first opportunity, to those most in need of it — that is, those who have not been able to reach Canada — and our recommendations on a broader definition of protection, we believe that the period before a person in Canada found not to be in need of protection may make another claim should be lengthened from 90 days to one year.

RECOMMENDATION 97

The Immigration and Citizenship Act and the Protection Act should reflect that the protection agency would have jurisdiction over all protection claims as soon as they are made. Ineligibility determinations would be made by Protection Officers, except where a person comes to Canada within the year after being found not to be in need of protection or where a person comes from a safe third country. In those cases, the determination would be made by the status determination officers.

RECOMMENDATION 98

The Protection Act should include a provision that precludes making a further protection claim while an unsuccessful claimant remains in Canada. Where an unsuccessful claimant has left Canada after the claim was determined and has subsequently returned to Canada, the current period during which no new claim may be made should be extended from 90 days to one year.

(iii) Specific Inland Procedures

Once admitted to the inland determination process, it is essential that claimants have access to clear and timely resolution of their claims. This section deals with many of the more technical aspects of the proposed inland determination process that we propose.

1. First Interview

Upon arrival, the protection claimant would first be interviewed by an officer from Citizenship and Immigration Canada, as is presently the case.

The purpose of the first interview is to ensure that the immigration authority continues to meet its obligation with respect to the health and safety of Canadians. This means that the collection of information regarding these statutory requirements should be initiated at the earliest opportunity.

The protection agency would work in cooperation with a Citizenship and Immigration Canada liaison

officer who would, among other things, ensure that the initial verification of information by the department at the port of entry was transmitted to the protection agency.

The claimant would be given provisional status pursuant to the Immigration and Citizenship Act, which would be conditional on the obligation to appear for the protection interview, to give notification of any address changes, and to undergo a medical examination within a prescribed time limit. If provisional status is lost or not granted because of failure to meet these conditions, or because the claimant was undocumented and uncooperative or considered a danger to the public or a security risk, the claimant would be detained.

The current *Immigration Act* specifies that persons claiming to be refugees in Canada must undergo a medical examination within "a reasonable period of time as specified by a senior immigration officer." The "reasonable period of time" is generally specified as being 60 days. Many public health officials believe this is too long. A further problem is that there is no mechanism to enforce this provision. The only leverage at present is that refugee claimants must undergo a medical examination before they can obtain a work permit. Although most refugee claimants do undergo the medical examination, some do not, including many children as they do not seek work authorizations. This has led to complaints of tuberculosis cases in the schools from public health officials and school boards.

A more effective means of ensuring that all protection claimants in Canada undergo a medical examination for reasons of public health and safety must be instituted. There must be a system in place whereby all persons claiming protection in Canada are encouraged to comply with the requirement to undertake the examination. There should be consequences for those who fail to comply. The requirement for all claimants and their dependants to undertake a medical examination within 10 days of arrival in Canada should therefore be a mandatory condition of provisional status.

Recognizing that there will be some resource requirements, we would like to see a more proactive approach to security screening. There is a need to restore confidence in the immigration system's ability to identify the security risks and war criminals before they are settled in Canada. To that end, we propose that security and criminality checks be initiated as early as possible for persons seeking protection in Canada.

RECOMMENDATION 99

The Immigration and Citizenship Act should provide that statutory immigration requirements (medical, criminality and security checks) be initiated for persons seeking protection upon their arrival on Canadian soil.

RECOMMENDATION 100

The Immigration and Citizenship legislation should prescribe as a mandatory condition of provisional status for persons seeking protection in Canada, the requirement to undergo a medical examination for reasons of public health and safety within 10 days of arriving in Canada.

2. Timely Processing by Protection Agency

Whether detained or not, the claimant would be immediately referred by Citizenship and Immigration Canada to the protection agency, which would be located at major ports of entry. The location, business hours, and set-up of the protection agency's reception office should be designed to encourage most claimants to make their claim within hours of arriving in Canada. At the reception office, claimants would have a brief face-to-face information interview during which they would be advised of the nature of protection grounds in Canada and provided with forms to make a protection claim and undergo a medical examination. The reception officer who concludes that there is strong *prima facie* evidence of a need for protection (for example, evidence of torture) could make a written recommendation to the Protection Officer. In such cases a Protection Officer would be empowered to grant protection without a protection determination interview.

Claimants would be required to report to the protection agency within three full business days, and submit their claim for protection within 10 business days after reporting to the protection agency. This might appear to be a tight time frame, but the entire system should be designed to ensure that all necessary information and assistance is provided proactively and immediately. This would include

counselling at the protection agency reception office located at major ports of entry and in major cities. It is our conviction that delays in processing asylum claims are a major draw factor for unfounded refugee claims. Reducing delays should reduce non-productive work and thereby conserve resources for overseas programs. *Bona fide* protection seekers who have reached Canadian shores should find it in their best interests to come forward without delay.

A person who has not made a protection claim within the 10 days allotted would have to demonstrate either circumstances that materially affected the capacity to make the claim (a documented serious illness, for example), or substantive changes in circumstances in the country from which protection was being claimed. An application to submit a protection claim after the deadline would be assessed by a Protection Officer, who would hold an interview where credibility was an issue.

RECOMMENDATION 101

The Protection legislation should codify all requirements and time limits of the inland process, equally applicable to all parties. The legislation would establish time limits for filing a protection claim inland, with possible extensions permitted due to a change in circumstances.

3. Access to Assistance and Counsel

In practical terms, counselling would be provided at the first opportunity, normally at the port of entry. Services would be tailored to the individual's particular circumstances (for example, victims of torture).

On submission of a completed protection claim, the claimant should be given access to NGOs, legal counsel and competent interpreters, and assistance with arranging shelter, medical examinations, and applications for social assistance. In any situation where legal aid is not provided by the province, access to counsel should be facilitated by the protection agency. The applicant could be represented by a member of any provincial law society, a member of an association regulated by a province, or any other unremunerated person or firm. Given Canadian obligations under the Convention on the Rights of the Child, the protection agency would be responsible for ensuring unaccompanied minors were represented and provided with guardianship in cooperation with provincial officials.

RECOMMENDATION 102

The Protection legislation should provide for comprehensive assistance services to protection claimants at the port of entry.

4. Granting of Provisional Status and Access to Benefits

During the determination process, claimants would be granted provisional status (see Chapter 8) and would receive permission to work and be eligible for health services. Ideally, these privileges, and other pertinent information, would be encoded on a biometric identification card matched to the holder. The claimant might also be required to report regularly to protection agency officials using the biometric card.

Currently, the federal government pays the health expenses of refugee claimants through the Interim Federal Health Program. The eligibility of claimants for welfare has been a contentious issue with the provinces. In 1995, the imposition of a 90-day residency requirement for welfare in British Columbia created problems for newly arrived asylum claimants (the measure has subsequently been retracted). Some provincial and municipal governments have been particularly concerned by the social assistance burden arising from lengthy delays in the processing of refugee claims. These costs will drop dramatically if the time frames we recommend are implemented. However, since these time frames are within the competence of the federal government alone, we believe there will be additional fiscal discipline to adhere to them if the federal government assumes the costs of all welfare benefits of protection claimants until such time as the claimant is either removed from Canada or is accorded the status of landed immigrant.

RECOMMENDATION 103

The Immigration and Citizenship Act should permit the granting of provisional status to persons who claim to need protection except where a claimant is uncooperative, is determined to be a danger to the public, or poses a security risk. The Protection Act should accord persons with provisional status the right to work and other social benefits.

RECOMMENDATION 104

The Protection Act should require the federal government, through the protection agency, to assume all income assistance and health-care costs for inland claimants until the final determination of their cases (either accorded landed immigrant status or removed from Canada).

5. The Protection Determination Interview

Once the completed protection claim is submitted, the claimant would be given a date for the protection determination interview. This date would be within six weeks of the claim submission. The strict time frames imposed on the protection agency by the legislation would also apply to the claimant and his or her representative. Adjournments on the sole basis that the claimant's representative was not ready to proceed would not be granted. At the present time, 49% of all refugee hearings at the CRDD are adjourned at least once.[9]

Legal counsel and other persons representing asylum claimants play a key role in the determination process. While this role can and should be positive, it is also too often one of delay. The Protection Act should enhance the role of legal and other representatives by outlining the representative's responsibility to provide full and timely disclosure of identity and other documentation relevant to the protection application, and to cooperate in any pre-interview disclosure, such as providing a list of documentation bearing on the determination interview, and providing copies of any such documents not available to the protection agency.

The current system consists of a quasi-judicial hearing conducted by two IRB members who are assisted by a refugee claim officer in preparing cases and questioning claimants. An interpreter is usually present. This structure is supposed to reduce the need for an appeal, and the courts tend to grant more judicial deference to such an independent administrative tribunal.

We recommend a more administrative process for determining protection claims. The interview would be conducted by a Protection Officer, in the presence of the claimant's representative and an interpreter.

Before being assessed by a Protection Officer, protection claims would be reviewed by an employee of the agency to ensure that the case was ready to proceed. The employee would specialize in geographic areas and the review would deal with the following matters:

(a) verification that relevant documents have been filed by, or on behalf of, the claimant, and if documents are missing, ensuring appropriate follow-up;

(b) identification of factual issues from the claim and the conduct of appropriate research to complement factual shortcomings;

(c) clarification of uncertainties arising out of the pre-filed material by contacting the claimant (or, more normally, the claimant's representative) or scheduling a pre-interview session; and

(d) highlighting substantive issues arising from the claim and requesting legal or other specialized advice.

The Protection legislation would authorize this employee to recommend to a Protection Officer that a claim be accepted without an interview, if the case so warranted.

The claimant would be provided with a copy of any additional information on file. Comments made by the claimant (or the claimant's representative) would be recorded if given at the pre-interview session and would be included in the file submitted to the Protection Officer.

The protection determination interview would examine the claimant's narrative in light of relevant background material. Claimants would be advised of the case they would have to meet, and would be able to dispute or correct elements of the case and present arguments. During the interview, the Protection Officers would disclose any specific information they would rely upon in rendering a decision. The claimant's representative would be permitted to intervene. Interviews would be

9 Auditor General of Canada, "Chapter 25: Citizenship and Immigration Canada and Immigration and Refugee Board — The Processing of Refugee Claims," in *Report of the Auditor General of Canada to the House of Commons* (Ottawa: Minister of Public Works and Government Services Canada, 1997), 27.

tape-recorded. Protection Officers would be encouraged to render decisions immediately where the need for protection was clear.

RECOMMENDATION 105

The Protection legislation should establish the conditions for a fair and timely process, with protection determination interviews to be held within six weeks of the submission of a claim, and the requirement for the claimant to provide full and timely disclosure.

RECOMMENDATION 106

To expedite the interview process, the Protection legislation should provide for an initial review of the case by designated employees of the protection agency. These employees would be authorized to recommend to a Protection Officer that a claim be accepted without an interview where the case warranted.

6. Decisions

The Protection Officer should be required by regulation to provide the claimant with a written positive or negative decision with reasons within six weeks of the date of the determination interview, that is, not later than 12 weeks after the initial claim. Decisions and their supporting reasons should be regularly examined for quality control, and for the training of Protection Officers and the preparation of reference material.

Following a positive decision, the protection agency would refer the applicant to Citizenship and Immigration Canada for processing towards landed immigrant status. Persons found by the protection agency to be in need of protection, including those selected abroad, would have the right not to be *refoulés* whether or not the reason for granting protection accorded with the Geneva Convention. This right would remain subject to provisions allowing the removal of those found to be a danger to the public or a threat to the security of Canada.

RECOMMENDATION 107

The Protection legislation should require a protection decision to be made within six weeks of the interview. Successful claimants would be referred by the protection agency to Citizenship and Immigration Canada for processing towards landed immigrant status.

7. Appeals

During our consultation process, various groups and individuals expressed their concerns with the current review process. We were told that the judicial review system was too restrictive because of its leave requirement, and because grounds for review were limited to the legality of a decision.

In our proposed system, we believe that the option to appeal a decision made by a Protection Officer is necessary to maintain procedural fairness, to correct erroneous findings of fact, and to ensure consistent interpretations of the law, especially given the potentially life-threatening consequences of an error in judgement. An independent ruling on individual cases would be in line with the practice of other countries such as Australia, New Zealand, Switzerland, France, Denmark, Ireland, Germany and the Netherlands.

The current judicial review process does not provide first-level decision makers with the type of guidelines or directions they require. The possibility of a different conclusion or an error is not enough to justify the intervention of the federal court since the error must be deemed palpable and overriding. The proposed appeal process would provide an opportunity to review the facts of an individual decision and a mechanism for ensuring that the relevant law is correctly and consistently applied.

In our proposal, a claimant or the Minister could appeal in-Canada determinations to an appeal section of the protection agency. There would be no leave requirement. The appeal would be determined by an Appeal Officer of the protection agency. It would constitute a formal reconsideration of the Protection Officer's decision. The scope of the appeal would be questions of fact, or law, or mixed fact and law, and new evidence. New evidence on the claim would be admitted if the Appeal Officer accepts the claimant's

contention that it was unavailable at the time of the protection determination interview.

The appeal would be a paper review. However, an Appeal Officer would have the option of conducting an in-person interview to consider new evidence linked to credibility. The claimant could be represented. The representative could make written submissions and be present at any interview held.

No appeal would be considered unless submitted within 15 days of the Protection Officer's decision. Claimants and/or their representatives would have a further 15 days to present new evidence. The Appeal Officer would be required by regulation to render a decision within six weeks of the date the appeal was submitted. The Appeal Officer should be given full authority to resolve the case as expeditiously as possible. Thus, the Appeal Officer could confirm the Protection Officer's decision with or without the conduct of a second interview, or reverse the Protection Officer's decision with or without a second interview, but could not direct that a case be re-heard by a Protection Officer. Appeal decisions with reasons would be in writing, and decisions having precedent value would be published by the protection agency.

RECOMMENDATION 108

The Protection legislation should provide for appeals of protection decisions made by Protection Officers in Canada to an appeal section of the protection agency. The appeal should be restricted to a paper review based on the merits. The appeal section could request further information, confirm the decision, or render a new decision.

7.11 Protected Status: Temporary Status, Cessation

(i) Temporary Status

International conventions to which Canada is a party impose no obligation on states receiving refugees to provide them with permanent status. There is an obligation to ensure they are not *refoulés* and to provide a durable asylum. We have heard that affording permanent status to those granted asylum may not be in the overall best interests of international humanitarian programs.

Philosophically, the idea of temporary asylum is sound. It would make sense, for example, in a situation of large-scale movements where the root cause is of short duration. In such cases, asylum is effectively granted to a group and in theory, it is subsequently removed from the group.

We have explored various options and we have rejected models of temporary asylum as the basis for the Canadian protection system we envisage. We do so on grounds of fairness. Because of the life and death nature of a request for protection, we make these determinations on an individual basis. Similarly, if we were to revoke protected status we would do so on an individual basis. In our view, such a system would require a huge bureaucracy and be monstrously expensive if it were to function by anything approaching Canadian standards of justice. We believe it would produce few results.

Very few persons would actually be removed. The situation in countries producing persons in need of protection rarely changes clearly and quickly. If it did eventually become clear that protection was no longer needed, many individuals would have already developed substantial ties to Canada, rendering removal inhumane.

We feel that the Canadian tradition of giving access to landed immigrant status with the prospect of future citizenship will continue to serve us well. Some protected persons may indeed wish to return home once the situation stabilizes. But the individuals themselves, and the communities in which they live, can only benefit from a situation where protected persons know where they stand and can plan a future for themselves and their children. Landed immigrant status, in the system we outline, has no guaranteed permanency. But those who choose to live in Canada will normally be able to continue to do so and to enjoy Canada's protection, and they will normally be eligible for citizenship.

Persons granted protection but not possessing documentation to prove their identity to the satisfaction of Citizenship and Immigration Canada should, as now, not be eligible to apply for landing immediately. We recommend, however, that the current five-year waiting period for these persons be shortened to three. They would remain on temporary protected status during

this period while Citizenship and Immigration Canada actively investigates their identity.

RECOMMENDATION 109

The Immigration and Citizenship Act and the Protection Act should provide that persons determined to need protection but who cannot show satisfactory identity documents should be granted temporary protected status, and they could apply for landing after three years.

(ii) Cessation of Status

The Refugee Convention conceives of refugee status as a transitory phenomenon that expires when refugees can either reclaim the protection of their State or secure an alternative form of enduring protection. Because refugee law is intended to provide surrogate protection pending the resumption or establishment of meaningful national protection, the Convention explicitly defines the various situations in which the cessation of refugee status is warranted. Similarly, refugee status is envisaged as the entitlement of any person with genuine fear of persecution based on one or more of the articulated grounds. The principle of vacation is to deny the continued protection of Convention refugee status to persons whose claims are based on fraud or misrepresentation since they should never have been recognized as refugees in the first place.

In 1989, cessation and vacation procedures were incorporated into the *Immigration Act.* The Minister of Citizenship and Immigration can apply to the Immigration and Refugee Board to determine whether persons have ceased to be Convention refugees on the grounds that they have re-availed themselves of the protection of the country of persecution. Upon leave of the chair of the Immigration and Refugee Board, the CRDD can also vacate a claim if the person obtained recognition as a Convention refugee as a result of fraud or misrepresentation.

We believe that the principles underlying these procedures should apply to any type of protection, whether or not the person is found to be a Convention refugee. Under the new protection system we propose, we could maintain a process for revoking the status granted, inland or overseas, to a person determined to be in need of protection.

The cessation process would be carefully applied and would provide guarantees that a person's status would not be subject to unnecessary review in light of temporary non-fundamental changes. The purpose of cessation is not to hang a sword of Damocles over the heads of persons determined to be in need of protection. Cessation exists to increase the integrity of the protection objectives: protection should be granted to persons who deserve and require it.

The Protection Act should reflect the following changes to the cessation and vacation processes. The same procedure should apply to both processes and the leave requirement for initiating vacation should be eliminated. This process would be called cessation.

Grounds for cessation would include voluntarily re-availing oneself of the protection of the country of nationality or re-establishing oneself in the country that one left, or outside of which one remained; concealment, suppression or misrepresentation of a material fact, or fraudulent action by a person determined to be in need of protection; and persons with respect to whom there are serious reasons to believe that they have a) committed war crimes, crimes against peace or crimes against humanity; b) committed serious non-political crimes outside their country of asylum; and c) been guilty of acts contrary to the purposes and principles of the United Nations. The grounds for revoking protection should be applied narrowly, in accordance with the Vienna Convention on the Law of Treaties. This should be reflected in the User Guide.

Cessation could be initiated after a person is granted temporary protected status, or in the first three years after a person has become a landed immigrant. A decision on cessation would be made by the Protection Officer following an interview. Loss of landed immigrant status would be deemed to occur when the Protection Officer determined cessation.

The Minister could make an application before the protection agency for cessation of status of a person who has been determined to be in need of protection. The protection agency would then provide the person with a notice stating that the person should appear before the organization responsible for protection within the prescribed time limits.

With respect to re-availment of protection, the Minister would have to demonstrate that the person intended to obtain and obtained protection from the country from which he or she fled. All the circumstances of the contact between the person and the authorities of the country of origin would be taken into consideration (for example, whether contact was repeated or what advantages were obtained). In cases of fraud or misrepresentation, the Minister's representative would have to demonstrate that the alleged fraud or misrepresentation was intentional, manifest and decisive to the outcome. Except for landed immigrants, the cessation decision should not be subject to appeal.

RECOMMENDATION 110

The Immigration and Citizenship Act and the Protection Act should prescribe that a process to revoke temporary protected or landed immigrant status granted on protection grounds could be initiated at the instigation of the Minister. This process would be called cessation.

RECOMMENDATION 111

Cessation grounds would include: 1) re-availing oneself of the protection of the country of persecution; 2) status obtained fraudulently or through misrepresentation; or 3) reasonable grounds to believe the person committed war crimes or crimes against humanity.

RECOMMENDATION 112

The decision on cessation would be made by a Protection Officer following an interview. The decision would not be subject to appeal, except when the person whose rights are affected by the decision is a landed immigrant. In the case of a landed immigrant, the cessation procedures would have to be commenced within three years of landing. Landed immigrant status would be deemed lost when the decision of the Protection Officer concluded that there was cessation.

7.12 Landing Protected Persons

Under the current *Immigration Act,* persons determined to be Convention refugees within Canada may, within 180 days, file an application for landing. They and their dependants are granted landing unless they are inadmissible on national security or criminality grounds. Refugees selected overseas are provided with an immigration visa following the completion of medical, criminality and security checks, and are landed on arrival at the port of entry.

The nature of the social contract between a person granted protection and Canada should be seen as a continuum leading, if the person so desires, to full integration in the community and eventual citizenship. We recommend maintaining those grounds under which Convention refugees (and, in our model, other protected persons) would be ineligible for landing, that is, where the person has or is entitled to permanent status in a third country.

However, rather than the current 180-day limit, we feel that the process should be further streamlined and simplified. The application for Canada's protection should contain all the information necessary to also constitute an application for landed immigrant status, as is currently the case for refugees selected abroad. Upon a decision to grant protection, the individual's file could thus be transferred immediately to Citizenship and Immigration Canada for processing.

RECOMMENDATION 113

The Immigration and Citizenship Act should reflect that persons determined to be in need of protection by Canada should be immediately processed for landing, subject to the statutory medical, criminality and security checks.

RECOMMENDATION 114

All persons determined to be in need of protection either inland or overseas would be exempted from paying a fee for processing a landing application. They would still be subject to the right of landing fee, but a loan would be available.

RECOMMENDATION 115

The Immigration and Citizenship Act should continue to provide that immediate family members (spouses and dependent children) should be included in the landing application and processed concurrently, even if they reside abroad.

We do not feel it appropriate to require that persons in need of protection or their families meet the requirements regarding excessive costs for health services. At the same time, however, we feel it is important to maintain the protection of public health and safety. In order to accomplish this, all persons found to be in need of protection and their families should undergo an examination for public health risk.

We expect to see a number of persons chosen who will need medical care on arrival in Canada. Provincial health-care systems need to prepare for these persons and to plan for their ongoing care where necessary. Persons in need of protection and medical care should be guaranteed that adequate arrangements have been made for their arrival. We are recommending that the protection agency take on the role of ensuring that all necessary facilities arranged in the province of destination are in place prior to the arrival of protected persons needing medical care.

It has become a contentious issue between the provincial and federal governments that health care for refugee claimants has fallen to the provinces. Recently, provinces have started to unload the costs for claimants onto the federal government. The result has been increased costs for the federal government's Interim Federal Health Program, which exists by way of Order in Council. The program guidelines are not codified and, as a result, there is a lack of certainty for claimants as to what services they may claim. There is a need to move away from the vague wording of the current Orders in Council and to establish in law a health-care program for protection claimants and those in need of protection.

RECOMMENDATION 116

The Immigration and Citizenship Act should exempt persons granted protection in Canada and abroad and their dependants from the excessive cost component of the medical inadmissibility provisions. The Immigration and Citizenship Act should require that all persons outside Canada who are determined to be in need of protection, as well as those dependants outside Canada of a person determined to be in need of protection, should be required to undergo a medical examination for reasons of public health and safety prior to receiving their documentation to travel to Canada.

RECOMMENDATION 117

The Protection Act should specify that when a person abroad in need of protection requires extensive medical care, the protection agency must ensure that all necessary facilities are arranged with the province of destination.

RECOMMENDATION 118

The Protection Act and the Immigration and Citizenship Act should reflect the federal government's responsibility for medical costs for persons seeking protection in Canada and those found to be in need of protection prior to obtaining landed immigrant status.

7.13 Implementing a New Protection System

The current refugee determination system has almost 29,000 cases waiting to be heard by the Immigration and Refugee Board. Given that we believe the prompt processing of cases to be essential for the new protection system, it is crucial that any new system not begin its work with the responsibility for processing the backlog cases.

Amnesties of any sort, under any guise, should be forcefully rejected. Public confidence in the inland determination system, and staff morale on the issue through the immigration and refugee systems, are very low.

Throughout this report, we have tried to ensure a system that will be cost-efficient and, in many instances, produce savings over the current model.

However, on the question of the current backlog, we must strongly recommend the allocation of one-time additional resources. The new protection system must enter into effect with a clean slate. The existing system must remain in place for a fixed time with sufficient resources to complete the processing of all claims received prior to the implementation date of the new protection system by the protection agency.

RECOMMENDATION 119

Resources should be allocated to maintain the current Convention refugee determination system until it has completed determinations for all claims received prior to the implementation date for the new protection system. The quorum of the Convention Refugee Determination Division should be reduced to one member for this purpose.

7.14 Removals

Removals should be executed as quickly as possible after a negative final determination. We cannot stress strongly enough that this should be an absolute priority of the government. The integrity of the entire protection system depends on it. Those who are not accorded Canada's protection should not be permitted to remain; otherwise, the protection system would serve no purpose.

Table 7.1 Protection Determination Process: Inland/Overseas

DECISION-MAKING PROCESS	Inland	Overseas
Criteria	Canada's international obligations. Not limited to the 1951 Refugee Convention	Consistency between inland and overseas criteria
Deadline for making a claim	13 business days* from date of arrival in Canada, except changes of circumstances	None
Representation	Member of a provincial law society, of an association regulated by a province, or a person who is not remunerated	Member of a provincial law society, of an association regulated by a province, or a person who is not remunerated In all cases, representation at the claimant's expense
Decision maker	Protection Officer of the protection agency	Protection Officer of the protection agency, or designated NGO under agreement with the protection agency
Procedure	Interview within 6 weeks of filing claim with the protection agency	Initial pre-screening to determine whether there will be an interview
Decision – Reasons	Written decision and reasons provided within 6 weeks of the interview	Written decision and reasons provided within 6 weeks of the interview
APPEAL PROCESS	**Inland**	**Overseas**
	Application within 15 business days of the initial decision On the merits Paper review except when new evidence raises credibility issue Questions of fact, or law, or mixed fact and law; new evidence relevant to the assessment of the application/ claim (limited to evidence not available at the time of the first determination) Decision within 6 weeks by an Appeal Officer of the protection agency who may confirm the Protection Officer's decision, render the decision or dismiss the appeal	None

* To report to the protection agency within three business days of arrival, and submit the claim within the next 10 business days.

Chapter 8

Compliance: Building Confidence in the System

8.1 A Matter of Compliance

The *Immigration Act* was designed to allow Canada to control who comes into and remains in Canada in a manner consistent with the objectives of the Act, the rule of law, fairness and our international agreements. The law establishes a number of classes of persons who are inadmissible or not permitted to remain in Canada for reasons of criminality, security, danger or costs to Canada, or who are a threat to the integrity of the immigration system. The Act also provides for controls on removal and detention as well as offences for which violators can be fined or imprisoned.

Certain mechanisms were established to enforce compliance with the law. For example, persons who are being processed, whose status is unclear or who are awaiting removal, are often allowed to be at liberty in Canada under certain conditions, such as a requirement to report to an immigration officer on a regular basis. This approach works as long as immigration officers are available to follow up and ensure compliance with reporting conditions. Another example is that currently, many persons found to be in violation of the Act are given departure orders which give them 30 days to depart Canada. These orders are given on the understanding that the persons will depart. Failure to comply leads to an automatic deportation order.

This system was largely created at a time when, should someone fail to comply, the systems could respond quickly and efficiently with minimal resource requirements. Generally, those who failed to comply could be denied entry or removed. The system worked with a high degree of integrity. There were no rewards for failing to comply, so most people complied. Enforcement processes worked smoothly and could combine a high degree of control with a high level of process, in the form of inquiries and appeals, to deal with those found to be in violation.

8.2 A Lack of Compliance

The world has changed enormously in the past 20 years. In particular, the number of people in transit has greatly increased. Travel and communications are cheap and easily accessible. Wars, poverty and repressive governments continue to push many people out of their homelands. Canada, along with other wealthy nations, has received an influx of people seeking protection and a new life. While Canada wants to help those in need, and will continue to do so, the systems established in an earlier time have not functioned well. Changes to the refugee determination process and the enforcement provisions of the Act have not succeeded in restoring integrity.

Some people coming into Canada have found that it may be in their interests not to comply because the system as presently designed will allow them to meet their own ultimate goals. Citizenship and Immigration Canada cannot control the large numbers of people coming into the country who are inadmissible or who become subject to removal during their stay here. The department lacks the resources, the means and perhaps the will to deal effectively with them. The entire enforcement system has become overwhelmed. Without an incentive to comply with removal orders or reporting conditions, people will continue to stay on and become lost in the system.

Similarly, some people who sponsor family members have learned that they need not comply with their sponsorship agreements. There are no effective enforcement procedures in place. People smugglers bring illegal immigrants to Canada without fear of prosecution. People come with no passport or other identity documents knowing they will not be removed. Some employers illegally employ foreign workers because there is rarely any follow-up. All of these issues point to a loss of integrity and a need to find new methods of ensuring compliance.

8.3 A Crisis of Confidence

(i) Public Perception and Political Response

The 1994 immigration consultations highlighted a loss of public confidence in the department's ability to enforce the *Immigration Act.* These concerns have not disappeared. The publicity given to crimes committed

1 See for example: Derrick Thomas, *The Foreign Born in the Federal Prison Population,* Paper presented to Canadian Law and Society Association Conference, Ottawa, June 8, 1993, which found that the foreign-born are under-represented in Canada's prison population.

by visitors, refugee claimants, refugees and immigrants continues to be disproportionate to the reality.[1] Canadians take offence when someone who has been granted the opportunity to visit, seek refuge or live permanently in Canada commits a crime. Both the department and its programs come under severe criticism with each serious event, especially those involving violence, weapons, drugs and sexual offences. This undermining of public confidence erodes public support for the immigration and protection programs and poses significant political challenges.

A common thread in the submissions was the concern that the system cannot function effectively without a reduction in due process. Many submissions recommended that access to the refugee determination system be restricted and that existing avenues of appeal be removed. Others criticized the current provisions as too strict and arbitrary.

(ii) Problems with the Current System

We do not accept that either the need for due process or the generosity of Canada's policies and programs is to blame for the loss in public confidence. The problem is much more complex, and there will be no long-term solution without the domestic and international partnerships which we will explain in more detail later in this chapter. We also need to concentrate on creating the legislative tools and developing the procedures which will enable the detention and removal of persons who challenge the integrity of the system.

Two major problems with the current system are the lack of an "enforcement continuum" and the absence of incentives for voluntary compliance. These problems are characterized by:

- an inability to track clients effectively;
- delays at the removal stage;
- a process-based organizational structure; and
- the perception of arbitrary detention decisions.

1. Inability to Track Clients

The majority of persons awaiting inquiry or removal are not detained. Terms and conditions are imposed by either an immigration officer or an adjudicator on the assumption that they provide a measure of control. While the specific terms and conditions vary from case to case, the most common conditions imposed are the requirement to provide one's current address and to report in person at a specified location.

There is no effective system in place to verify compliance with these terms and conditions. Thousands of persons awaiting inquiry or removal, or who are undergoing the refugee determination process are physically in Canada, and thousands of others have already left the country voluntarily, but the department is not aware of their whereabouts.

Without this information, officers are almost invariably working with outdated addresses when the case finally reaches the removal stage. The ensuing investigation is costly and time-consuming. Clients, for their part, have no incentive to keep the department informed and may opt not to comply voluntarily in the knowledge that this will extend their stay in Canada.

2. Delays at the Removal Stage

At the removal stage, regardless of where a person first had access to Canada, travel arrangements are made, passports are obtained, and persons depart Canada. Detention cases receive priority processing, but this does not necessarily translate into a speedy removal.

There are a number of factors that affect whether a case can proceed expeditiously. One is the lack of a travel document. This may result from a person's refusal to cooperate by either producing a travel document or signing the necessary forms to obtain one. It may also be the result of a lack of cooperation from a foreign government in actually issuing a document. The former highlights the weakness in a system that may be thwarted by a person's refusal to cooperate. The essential element lacking is a real incentive for voluntary compliance. The latter issue is a formidable challenge for the government as it is linked to complex foreign policy issues.

3. A Process-based Organizational Structure

The work associated with moving a case through the various phases of the enforcement system (i.e. investigation, inquiry and removal) is currently organized as a series of discrete activities. The consequences of this fragmented approach are poor coordination, conflicting priorities, and lack of accountability and/or

control over outcomes. These systemic problems inhibit the department's ability to deploy its resources strategically and to focus on outcomes. The system is process- rather than outcome-oriented.

Some of the specific issues we have identified are:

- Inability to organize and focus work with enforcement objectives in mind (i.e. failure to do work at the front end to facilitate the downstream process);
- Lack of a case management system to allow managers to develop management strategies and anticipate workload trends; and
- Poor or inadequate information-sharing systems both within the department and with external partners.

4. Perception of Arbitrary Detention Decisions

The Act currently provides two bases for detention: unlikely to appear for immigration proceedings and danger to the public. The power to detain is vested in immigration officers and adjudicators. With such broad powers given to officers to deprive persons of their liberty, concern has been expressed by many that in the absence of specificity in the Act, and with virtually no policy guidelines issued by the department, the standards for detention are not transparent and vary greatly from office to office and officer to officer.

8.4 Towards a New Approach to Achieving Compliance

The following are the key elements of our proposed approach for a system that will encourage compliance:

- An objective, unambiguous legislative framework;
- Incentives for voluntary compliance;
- Transparent and codified inadmissibility, detention and removal criteria;
- A front-end approach to enforcement (an "enforcement continuum");
- A flatter structure for assessing violations of immigration law; and
- The availability of means (systems, resources, training).

We will discuss these elements in the sections that follow.

(i) Provisional Status: The Glue That Binds

The key to our approach, and the glue which will bind the elements together, is the principle that all persons at liberty in Canada, other than Canadian citizens, should have some form of "status" as defined in the proposed Immigration and Citizenship Act. The foundation of a simpler legislative framework is the creation of clearer links between inadmissibility, detention and removal from Canada. At present, the links are far from clear. We propose the creation of a new form of status — provisional status — as the missing link.

(ii) Provisional Status: A Definition

Many people are allowed to enter and/or remain in Canada pending the outcome of an application, an investigation, or an appeal against the removal of their status in Canada. In most cases, the point at issue is whether or not they are admissible and, if not, subject to removal from Canada.

These people fall into what we refer to as "immigration limbo." For example, a person who claims to be a refugee at a port of entry is allowed into Canada and is issued a conditional departure order which prevents removal until the claim has been determined. Similarly, a landed immigrant whose status has been revoked is issued a removal order. But the execution of the removal order is stayed until any appeal of the decision has been finalized, and the person may remain in Canada without any formal status.

We propose a positive expression — provisional status — for the various circumstances in which a person with no other status may be at liberty in Canada. The dictionary defines "provisional" as "for the time being; temporary or conditional." This describes very aptly the sort of status we envisage. It is *temporary* in that it will not continue indefinitely — the eventual outcome will be formal status or removal from Canada. It is *conditional* in that it is dependent on the outcome of an application, an investigation, an appeal against a removal order, or successful completion of an outstanding requirement.

Under our proposed framework, there would be only three legal possibilities regarding a person's status in Canada under the Act:

- Resolved status: citizens, landed immigrants, temporary protected status, temporary;
- Provisional status: persons whose admissibility is unresolved; and
- No status: persons in immigration detention pending appeal/removal.

(iii) Provisional Status: Who Is Eligible?

Under the system we propose, very few people would actually have to make an application for provisional status. In most circumstances, the application would be deemed to have been made through another action. For example, a person making a claim to the protection agency would be deemed to have applied for provisional status.

We envisage that provisional status would be granted to a person:

- awaiting determination of an application for temporary protected status;
- allowed to enter Canada pending investigation of admissibility;
- granted early admission to Canada (e.g. Family Class, Tier One);
- admitted with a medical surveillance condition and unable to provide an address;
- whose formal status has been revoked and who is seeking review of the decision;
- whose removal from Canada is otherwise stayed; or
- who has been ordered to leave Canada and is making arrangements to do so.

(iv) Provisional Status: The Criteria

The criteria for provisional status would vary according to the reason for the person's ongoing presence in Canada. The criteria would be framed in a positive rather than in a negative way, and should be achievable through cooperation. Cooperation brings with it non-detention and benefits such as those to be provided by the proposed protection agency. The key criteria would be:

- The person is as described under the previous heading;
- The person is not likely to pose a danger to the public;
- The person is likely to appear for removal from Canada if required;
- The person has cooperated in providing evidence of his or her identity and/or in applying to the relevant authorities for documentation which would enable return to the country from which he or she seeks entry or to some other country; and
- The person is willing to comply with the mandatory conditions of provisional status as well as any discretionary conditions imposed by the decision maker.

A person who is not able to meet the requirements for provisional status without due cause would have to be detained.

(v) Provisional Status: Establishing Conditions

The key to achieving compliance is to link provisional status with conditions on a person's presence in Canada. Under our proposal, certain mandatory conditions would be prescribed for the various categories of persons with provisional status. Optional conditions, such as those relating to security deposits and performance bonds, would remain at the discretion of the decision maker, but should nonetheless be codified.

As an illustration of how this would operate, the following are the mandatory conditions we envisage applying to provisional status granted to a person seeking protection at a port of entry:

- To appear before the protection agency within three days of the date of arrival and to make a claim within ten days thereafter;
- To complete and provide the necessary forms to initiate criminal and security checks within three days of the date of arrival;
- To provide the department with an address within three days of the date of arrival and to advise of any change of address immediately;
- To undergo a medical examination within 10 days of the date of arrival;

- To report to the department as and when required;
- If the applicant does not have a valid travel document, to continue to cooperate with efforts to obtain one;
- To attend an interview with a Protection Officer on the specified date; and
- To report to an immigration officer within three days of notification of any decision to refuse the application for protection.

(vi) Monitoring Compliance with Conditions: A Tracking System

In the circumstances described, the conditions would serve to address the legitimate public concern that the government should know where persons are if their formal status under the Act is undecided. There is a clear need to be able to track persons as they make their way through the system. It will therefore be necessary to establish a reporting system for persons with provisional status.

We envisage an automated tracking and reporting system that would enable a person with provisional status to report without having to be seen by a departmental officer. As the identity of the person would be a key system integrity issue, we envisage the use of a biometrics identifier (a unique, unalterable physiological characteristic such as a finger-, palm-, retina- or voice-print) embedded in a client card. The client would use this card at designated kiosks at major ports of entry and other key locations. A match between the person's biometrics identifier and that embedded in the card would constitute a record of the person reporting.

An effective tracking system would require automated data links between the protection agency and Citizenship and Immigration Canada. The system should generate details of persons who had failed to comply with conditions (e.g. to attend an interview or to report to an enforcement officer within three days of a negative decision), and enforcement action would be initiated as soon as possible. Additional links would need to be made with other departmental systems and with programs dealing with support, health and other benefits. Such benefits should be linked to maintaining status and should cease if provisional status ends.

While the costs to establish such a system would be high, the long-term benefits would be significant. Persons with provisional status would be tracked effectively for the first time.

(vii) Loss of Provisional Status: Immigration Detention

An essential element lacking in the current system is an incentive for voluntary compliance. Our proposal ties compliance with conditions to the continuation of provisional status. Failure to comply with the conditions without due cause would result in loss of provisional status, arrest, detention and, if there are no obstacles, removal from Canada.

One of the most common criticisms is that initial detention decisions are arbitrary and highly discretionary. Under the legislative framework we are proposing, the discretion to detain would be limited.

While the objective would be to encourage cooperation and to grant provisional status wherever possible, detention would remain as a deterrent to non-cooperation or non-compliance. To that end, there must be a detention environment conducive to such an approach — access to telephones, to counsel and to non-governmental organizations, which is lacking at present.

A review of decisions to refuse provisional status would be an essential part of the process. The review would be initiated 48 hours after the decision to detain if it had not proven possible to grant provisional status in the interim. This is discussed in more detail in Chapter 9.

(viii) Loss of Provisional Status: Removal from Canada

We are proposing a system geared to outcomes: (i) provisional status while formal status is under consideration; (ii) formal status if the requirements are met; and (iii) removal from Canada if they are not.

This principle needs to be clearly stated in the Act and supported by the legislative structure. Just as we grant formal status to those who meet the legislative requirements, so should we ensure that those who do not meet them leave, or if they are not willing to do so, are removed from Canada.

The possibility of a negative outcome needs to be reflected in provisional status. One way in which this

would be achieved is through the clearly stated link between the granting of provisional status and cooperation in obtaining a travel document. One of the major causes of delay for departures from Canada would be addressed at the very outset of the process by requiring undocumented persons to sign passport applications on arrival rather than at the very end, as is currently the case. The enforcement continuum would start from the time the person arrived in Canada.

Similarly, the mandatory condition to report to an immigration officer within the prescribed period of a decision to refuse formal status reinforces this link with removal. Provisional status would cease automatically when an application for formal status has been finally determined. With both benefits and liberty tied to ongoing provisional status, the person would be required to make arrangements to depart voluntarily or be subject to mandatory detention and removal.

(ix) Advantages of Provisional Status

Our concept of provisional status addresses many of the failings of the current system. It provides a mechanism to:

- commence the health, criminality and security checks far earlier in the process;
- obtain travel documents far earlier in the process;
- know where people are and have greater confidence that they will comply with the conditions imposed on their presence in Canada;
- tie ongoing status, as well as any benefits, to continuing cooperation;
- encourage cooperation after a decision to refuse status has been made; and
- develop the information and administrative systems required to locate people who do not comply with conditions.

(x) Managing Provisional Status

Provisional status is not a panacea for all the ills of the current system. While it does provide a clear, transparent legislative framework on which to base a more strategic approach to achieving compliance, it will not be effective unless there is a commitment to provide the resources, training and data links required.

RECOMMENDATION 120

The Immigration and Citizenship Act should include a provision which specifies that all persons legally in Canada, other than Canadian citizens, must have status under the Act. Any person without status under the Act would be subject to arrest, detention and removal from Canada.

RECOMMENDATION 121

The Immigration and Citizenship Act should provide for a form of status, to be referred to as provisional status, for those persons who should be allowed to enter and/or remain in Canada pending (i) the determination of an application to stay here in the longer term; (ii) an appeal against a removal order; or (iii) departure if so ordered.

RECOMMENDATION 122

The Immigration and Citizenship legislation should only provide provisional status in situations where the person (i) is not likely to pose a danger to the public; and (ii) is likely to appear for removal from Canada if required; and (iii) has cooperated with respect to providing evidence of his or her identity and obtaining documentation which would enable departure from Canada if required; and (iv) is willing to comply with the conditions of provisional status.

RECOMMENDATION 123

The Immigration and Citizenship legislation should prescribe both mandatory and optional conditions for the various categories of persons with provisional status. The optional conditions should describe those conditions which may be imposed on a person with provisional status according to the circumstances in the particular case.

RECOMMENDATION 124

The Immigration and Citizenship Act should prescribe that failure to abide by the conditions imposed on provisional status without due cause would result in revocation of that status and mandatory detention.

RECOMMENDATION 125

The Immigration and Citizenship legislation should require the monitoring of compliance with conditions of provisional status. To that end, Citizenship and Immigration Canada should develop an automated tracking system that would interact with other databases relating to the person's status and benefits in Canada.

8.5 Reducing the Number of Decision Layers

Another key element of our approach is a flatter structure for assessing violations of immigration law. The current system affords a high degree of procedural fairness but epitomizes a layered, process-based approach. We propose an administrative process for investigating and making findings with respect to alleged violations. This process will liberate the various layers of officers playing partial roles in the process, allowing them to become decision makers. In the system we propose, the bulk of the resources would be moved to the front of the process, with all decisions being made by status determination officers, a new group who would assume many of the tasks of senior immigration officers and adjudicators. To the extent possible, violations of the Act would be described in concrete terms to minimize the use of discretion, and codified to ensure transparency.

(i) Overview of Current System

The current system for dealing with persons considered to be in violation of the *Immigration Act* has two streams. Simple, straightforward violations, such as persons appearing at a port of entry without a required passport or visa, or persons who have previously been deported and who have entered Canada without permission of the Minister, may be dealt with by senior immigration officers. The senior immigration officer, upon verifying that the allegation is true, may issue a removal order to the person concerned.

More complex cases, such as criminality, security or violations involving a weighing of evidence, are referred to an inquiry. An inquiry is a quasi-judicial proceeding before an adjudicator. Any person reported for a violation of the *Immigration Act,* except those given a removal order by a senior immigration officer, must be brought before an adjudicator who must decide if the report is correct and issue the appropriate status or removal order based on the decision. The department is represented at the inquiry by a case presenting officer. Adjudicators currently work under the auspices of the Adjudication Division of the Immigration and Refugee Board.

(ii) Problems with the Multi-layered Approach

The problem is not with the quality of decisions being reached under the inquiry system. The quality of the work of immigration officers and senior immigration officers in preparing reports that lead to the issuance of removal orders is generally good. The problem is the expensive, cumbersome nature of a system that, for the most part, enables adjudicators to do little more than affirm the conclusions already reached by senior immigration officers. The system lends itself to becoming clogged up with routine cases and epitomizes the compartmentalized, process-based approach we highlighted at the beginning of this chapter. The challenge is to develop a model that will address these concerns while maintaining appropriate standards of procedural fairness. This model would include a flatter structure, clear and unambiguous codification, and review in appropriate circumstances.

(iii) A Flatter Structure for Assessing Violations of Immigration Law

We propose that the system be streamlined by transferring the authority regarding inadmissibility currently held by adjudicators to status determination officers. This would result in a single administrative process for making the primary decision in respect of persons considered to be inadmissible.

The current multi-layered system involving senior immigration officers, case presenting officers and adjudicators at formal inquiries would be replaced by a simple process involving only status determination officers. The position of the status determination officer would need to be designed to reflect the decision-making process. There would also be a need for ongoing, high-quality training to ensure consistent, accurate decisions. We are also aware that in establishing this change, consideration must be given to the issue of the independence of the decision maker.

The system we envisage would be quick and efficient, resulting in savings in both time and resources. Removals would occur more quickly because multiple file transfers and reviews would be avoided. Decisions would be made more rapidly and the need for prolonged detention would decrease.

Consistent with the principle that the level of procedural safeguards should be directly proportional to the client's degree of attachment to Canada, landed immigrants whose status was revoked would have a review right. Similarly, a review right would apply to persons found to be in need of protection, and with respect to any decision where the weighing of evidence is required on the part of the decision maker. The proposed review system is described in more detail in Chapter 9. The possibility of combining all decisions leading to removal under a single judicial review application should be explored.

RECOMMENDATION 126

The Immigration and Citizenship Act should provide for an administrative process, presided over by a status determination officer, to determine alleged breaches of the Act.

(iv) Greater Transparency in Inadmissibility and Removal Criteria

The need for discretionary decision making should be reduced wherever possible. There is considerable scope for greater codification of those situations giving rise to allegations regarding breaches of the Act. If a person failed to meet a set of transparent criteria, the decision would be mandatory and would not require the current level of discretion.

The situations which give rise to allegations, such as committing serious crimes, eluding examination to enter Canada, overstaying on a visit to Canada, or working without authority, would need to be clearly codified. At present, they are contained mainly in operational memoranda. Greater codification would result in outcomes that are more predictable and more understandable to clients, their representatives and other interested parties. It would enable a lesser degree of investment in each individual case without compromising the fairness of the process.

RECOMMENDATION 127

The criteria to determine inadmissibility and revocation of status should be objective and therefore minimize the weighing of evidence. Those criteria should be prescribed in the Regulations.

(v) Codification of Procedural Fairness

Flattening the decision making process should not result in the loss of procedural fairness. It is essential that the legislation be written in such a way as to guarantee procedural fairness at all stages of the process.

In order to achieve this, as well as to ensure that officers know what is expected of them, the key elements of procedural fairness should be codified in the legislation. This will not in itself magically improve the quality of decisions, but it will result in a more consistent, predictable approach. Some, but by no means all, of the key aspects of procedural fairness which could be codified are:

- The right to counsel where applicable;
- The right to an interpreter at any time;
- The information to be provided to a client;
- The right to know the nature of an alleged violation;
- The right to be advised of any relevant information received from other sources;
- The right to respond to any allegations or adverse information;
- The way in which decisions are notified to clients; and
- The right to be advised of any review/appeal rights.

In line with what we have said throughout this chapter, the process would vary depending on the status of the individual and the complexity of the alleged breach. For example, the process for a landed immigrant whose status might be revoked would provide greater safeguards than the process for a person who has overstayed on a visit to Canada.

Procedural fairness also includes the right to a timely decision. It is imperative that status determination officers be required to make their decisions within fixed time limits. These time limits would vary according to the complexity of the issues involved.

Thus, a case involving the lack of documentation at a port of entry might be resolved within hours or, at most, days. A case involving fraud in the acquisition of landed immigrant status or a foreign conviction may take months to resolve since documentation from a foreign jurisdiction must be gathered and verified. We envisage a sliding scale, with some room for extensions if need be, but the principle of timeliness must be maintained as a part of procedural fairness.

RECOMMENDATION 128

The Immigration and Citizenship legislation should establish fair procedures for processes which may lead to loss of status, denial of entry or removal from Canada.

8.6 Other Inadmissibility Issues

In this chapter, we have discussed the need for a simple and transparent framework to enforce compliance with the law. The inadmissibility and removal provisions are not so much the framework as the specific tools which decision makers use in every single case they consider. While not an end in themselves, they do establish the rules and must therefore be readily understood by clients and by the general public.

A strong message we received during our consultations was that the Act was already powerful enough in this area. Many submissions warned against adding additional powers when the problems were perceived to relate primarily to the Act's implementation. The modifications we are proposing for people who are inadmissible and subject to removal are not intended to be revolutionary. They reflect our attempt to make the specific legislative tools more effective, more transparent and more easily administered.

(i) A Need to Restructure

The current *Immigration Act* distinguishes between persons who are inadmissible at ports of entry and those who are subject to removal inland. These distinctions are useful and serve to differentiate discrete levels of seriousness and rights. However, there have been numerous amendments to the current legislation, and the inadmissibility sections have become blurred and confusing.

Future legislation should be more accessible to both the professional and the layperson. It should be organized to reflect the basis of the inadmissibility on its face. Thus, all inadmissible classes dealing with criminality should be grouped together in a criminality category. Likewise, all security risk or financial inadmissibility classes should appear in appropriate distinct groupings.

We suggest the categories of "Medical," "Criminal," "Security," "Financial" and "System Integrity." While there are various levels of risk involved in each category, these headings best summarize what the provisions of each category have in common.

RECOMMENDATION 129

The Immigration and Citizenship Act should describe the main categories of persons who are inadmissible, or those who have violated a provision of the Act such that their immigration status should be revoked, under the headings "Medical," "Criminal," "Security," "Financial" and "System Integrity."

(ii) Medical Inadmissibility

Currently, all immigrant, and some visitor, applicants must undergo a medical examination and are assessed on an individual basis. There are two grounds for inadmissibility: (i) danger to public health or to public safety; and (ii) excessive demands on health or social services.

1. Excessive Costs

We heard many conflicting positions on the issue of excessive demand. The concern was not with the demands on the system, but with the costs the system has to bear, so we prefer the term "excessive costs." Some submitted that the law discriminates against persons with disabilities and keeps good immigrants out of Canada. Others submitted that too many high-cost immigrants were slipping through the system. Many felt that the process lacked transparency and objectivity and provided too much authority to medical officers.

The concept of "excessive costs" must be defined to give clear direction to medical officers and to be transparent to applicants and their families. Inadmissibility due to "excessive costs" should reflect

the costs which provincial medical and social systems are clearly unwilling to pay regardless of the individual's potential contribution to society. It is essential for provincial governments to be closely involved in the development of the definition, not just in a consultative role, but as full participants to reflect their interest in the provincial health care and social systems.

RECOMMENDATION 130

The Immigration and Citizenship Act should maintain the distinction between persons who are inadmissible for reasons of danger to public health and safety and those who are inadmissible on account of excessive costs to the health-care system. The term "excessive costs" should be defined by the Federal-Provincial Council on Immigration and Protection and described in the Regulations in such a way that it is transparent and objective.

There will arise situations where it may be considered best for a non-nuclear family member to join family in Canada, notwithstanding medical inadmissibility. Likewise, there may be Self-supporting Class applicants, foreign workers or other applicants who will be inadmissible because of excessive costs but whose presence in Canada is otherwise desirable. There should be a means of determining who should be allowed to come to Canada in such cases. As it is the provinces who both pick up the costs and reap any benefits of allowing otherwise inadmissible applicants to enter Canada, they should play a key role in establishing the criteria for admission in these circumstances.

RECOMMENDATION 131

The proposed Federal-Provincial Council on Immigration and Protection should establish criteria for the admission of otherwise medically inadmissible persons.

Elsewhere in this report, we have made a number of recommendations that have an impact on the operation of the excessive cost provisions for immigrants, visitors and persons in need of protection, and that bear repeating here.

Family Issues (Chapter 5)

- We have recommended that sponsored spouses and minor children be exempted from the excessive cost provisions on the grounds that separating families on this basis is both inhumane and, in view of the alternative means by which such persons have been able to enter Canada after a successful appeal on equity grounds, or on a Minister's Permit, ultimately ineffective.
- Because of the different degree of emotional dependency of parents and other members of the proposed tier two of the Family Class, we have also recommended in chapter 9 that review of refusals based on excessive cost provisions should, for applicants in this tier, be restricted to questions of fact, law, or mixed fact and law.

Self-supporting Immigrants (Chapter 6)

- We have recommended that persons temporarily in Canada as workers, students and visitors obtain appropriate coverage in order to have access to necessary health care. This is intended to afford provincial governments greater protection from excessive costs.
- We have recommended that a streamlined health clearance system be implemented for temporary workers to ensure that temporary workers are not unduly delayed in coming into Canada to work.

Persons in Need of Protection (Chapter 7)

- We have recommended that persons granted protection in Canada, and their dependants granted protection either in Canada or overseas, should be exempt from the excessive cost provisions.

2. Public Health and Safety

Every year, a large number of immigrants found to be medically admissible are issued immigrant visas under the condition that they subject themselves to medical surveillance by provincial health authorities. Most of these immigrants are persons with inactive, thus currently non-contagious, tuberculosis. It is essential that health authorities follow up on such cases to ensure that the tuberculosis has not become infectious. Landed immigrants with this condition are therefore instructed to notify provincial health authorities of any change of address.

The system does not function well in all provinces. There is a need to ensure that the federal government has the necessary client information to assist the provinces, and that the means exist to take action against landed immigrants who fail to meet their conditions of landing. We must stress, however, that these measures will be totally ineffective if the provinces do not have the structures in place to make the system work. In an age when millions of people, both Canadians and others, are crossing our borders every year, provincial governments must ensure that they have adequate networks to protect public health.

RECOMMENDATION 132

The Immigration and Citizenship Act should include a provision whereby persons subject to medical surveillance requirements should be granted provisional status and should only be landed as immigrants after having provided an acceptable contact address in Canada.

RECOMMENDATION 133

The Immigration and Citizenship Act should require that landed immigrants subject to medical surveillance requirements demonstrate that they have maintained ongoing contact with provincial authorities as required before renewal of their landed immigrant documents or approval of their application for citizenship.

In Chapter 7, we dealt with the public health and safety aspects of persons seeking protection. There, we made a number of recommendations designed to ensure that residents of Canada are not subjected to undue risk. We made the following recommendations:

- There should be a requirement for all claimants and their dependants to undertake a medical examination within 10 days of arrival in Canada as a condition for maintaining provisional status;
- All persons outside Canada who are determined to be in need of protection, as well as those dependants outside Canada of a person determined to be in need of protection, should be required to undergo a medical examination for reasons of public health and safety prior to receiving their documentation to travel to Canada;
- The federal government should accept responsibility for medical costs for persons seeking protection in Canada and those found to be in need of protection prior to obtaining landed immigrant status, thereby taking pressure off the provincial health-care systems.

3. Routine Medical Tests

The current routine medical examination includes a medical history and routine tests. The current tests have been in place for over 40 years. It is generally agreed that the time has come to design a new set of tests which better reflect current realities and the state of technology. Establishing these new tests is a matter for the Minister of Citizenship and Immigration, the Minister of Health and the provincial ministers responsible for health.

While Citizenship and Immigration Canada must remain in control of the operational aspects of medical screening for the purposes of immigration, the Minister of Health should assume a central role in defining medical testing criteria. The Minister of Health should work with colleagues in provincial governments and with the Minister of Citizenship and Immigration to establish, on an annual basis, which tests are necessary for immigrants and visitors. To ensure accountability, the testing regime for each year should be tabled in Parliament along with the results from the previous year.

RECOMMENDATION 134

Routine medical tests to be taken by visitor and immigrant applicants should be determined by the Minister of Health in consultation with the Minister of Citizenship and Immigration and provincial health ministers. The Immigration and Citizenship Act should direct the Minister of Health to table an annual report in Parliament establishing the testing regime for the coming year and stating the statistical outcomes of the previous year's medical examinations.

In order for such a system to work, Health Canada officials will need to have the most up-to-date information available for reliable decision making. While there exist a number of international information-sharing networks with which Health Canada has connections, we consider that more can be done to improve current systems. To this end, it would appear

that Citizenship and Immigration Canada medical officers overseas are in an advantageous position to gather and report on emerging conditions and diseases around the world.

RECOMMENDATION 135

Citizenship and Immigration Canada and Health Canada should jointly train Citizenship and Immigration Canada medical officers to collect information on emerging and ongoing international health risks.

(iii) Financial Inadmissibility

The sections of the *Immigration Act* dealing with persons unwilling or unable to support themselves were created to prevent the abuse of Canada's social service system by non-Canadians. Preliminary information from the Longitudinal Immigration Database confirms that immigrants are not a major source of concern in this regard. The only areas of concern lie with government-sponsored refugees and Family Class immigrants. We believe that our recommendations in chapters 5 and 7 on family and protection will alleviate these problems.

We have also made a recommendation that ensures that persons in need of protection and their immediate family members are not subject to any provisions that would render them inadmissible on account of being unable to support themselves in Canada.

(iv) Criminal Inadmissibility

1. General Criminality Provisions

There are many provisions in the current *Immigration Act* restricting the entry to, and the continuing presence in Canada of, criminals. These provisions distinguish between the seriousness and the nature of the crimes and the immigration status of the criminal.

The criminality provisions of the *Immigration Act* have served their purpose well. We would not recommend that they be either weakened or strengthened. Our concern is that they are difficult to understand. There is also a certain amount of overlap from the many modifications to the Act in recent years. For example, there are currently two provisions dealing with organized crime in the inadmissibility criteria. The earlier version is rarely used because the newer one is much more effective. This duplication can be easily corrected.

RECOMMENDATION 136

Without altering the broad range of criminality which leads to inadmissibility, the relevant sections of the *Immigration Act* should be carefully examined with a view to simplifying the provisions in order to remove inconsistencies and eliminate unnecessary overlaps.

2. War Criminals

The failure of the citizenship and immigration systems to deal with war criminals in a quick, efficient manner has become apparent in the past few years. We received a powerful message during our consultations and in the written submissions that the public concern in this regard is strong and unanimous.

Persons found to be war criminals or to have been members of organizations involved in war crimes or crimes against humanity must be removed from Canada as quickly as possible. We do not believe that persons dealt with as war criminals under the *Citizenship Act* should also have a right to full process, including appeal and review rights, under the *Immigration Act*. Given our recommendation that the *Citizenship Act* and the *Immigration Act* be consolidated, we believe that it would be possible to merge the two processes so as to swiftly achieve the single goal of removing war criminals from Canada.

RECOMMENDATION 137

The Immigration and Citizenship Act should include a provision to the effect that revocation of citizenship should result, without appeal rights, in loss of all status in Canada and subsequent deportation in cases of:

(a) a criminal conviction for war crimes or crimes against humanity committed before citizenship was granted,

(b) a finding that the person was a war criminal or had committed crimes against humanity, or

(c) fraud because of membership in an organization involved in war crimes or crimes against humanity.

(v) Security Inadmissibility

Security issues are dealt with in a number of provisions in the *Immigration Act.* Each is designed to deal with certain types of individuals and eventualities. Each provision has its related problems with regard to proving the allegations in situations where the information is sparse and often considered to be confidential. The desire to protect sources of sensitive and confidential information is often seen as being in conflict with the rights of the person concerned. The objective is to obtain a balance between the rights of the person and the security of the State.

The current provisions allow for inadmissibility or removal on a number of grounds: acts of espionage or subversion against democratic governments, subversion by force of any government, terrorism, war crimes or crimes against humanity. Throughout the *Immigration Act,* there are references to security risks under various appellations, with no clear definition given at any point. In order to clarify and simplify the references, we would like to see one standard definition. The *Canadian Security Intelligence Service Act* defines "threats to the security of Canada."[2] We consider that, where applicable, a security-related provision in the Immigration and Citizenship Act should correspond with the definition in the *Canadian Security Intelligence Service Act.*

RECOMMENDATION 138

The terminology in the Immigration and Citizenship Act dealing with security issues should be standardized with consistent definitions. For example, the definition of "threats to the security of Canada" should correspond to the definition of the same term in the *Canadian Security Intelligence Service Act.*

(vi) System Integrity Inadmissibility

Occasions arise where Canada, along with its international partners, imposes sanctions against certain countries for reasons of human rights or international law violations. Currently, Canada does not impose any specific restrictions on travel to Canada on persons connected to the regimes of these countries. It is our recommendation that people connected with the governments of countries against which Canada has imposed sanctions should be denied entry to Canada except with the permission of the Minister.

2 *Canadian Security Intelligence Service Act* [1985] R.S.C. c. C-23, s. 2 "[T]hreats to the security of Canada means

(a) espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage,

(b) foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person,

(c) activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political objective within Canada or a foreign state, and

(d) activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada,

but does not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in paragraphs (a) to (d)."

RECOMMENDATION 139

The Immigration and Citizenship Act should contain a provision that makes members of a government, or persons connected with a government or regime, against which Canada has approved sanctions, inadmissible to Canada except with the permission of the Minister.

8.7 Offences and Prosecution

The *Immigration Act* specifies those offences for which a person may be charged and, if found guilty, fined or imprisoned. Generally, these offences relate to persons who attempt to come into Canada by illicit means. There are also explicit offences for aiding or counselling someone to come into Canada illegally and for people smuggling.

Responsibility for the investigation of immigration offences and the laying of charges lies with the Royal Canadian Mounted Police (RCMP). Immigration officers are neither authorized nor trained to lay charges for offences under the *Immigration Act*.

Many of the offences in the *Immigration Act* are relatively minor in nature, and the courts tend to impose light sentences reflecting the degree of seriousness of the offence. Most of the charges laid relate to persons using false documents or returning to Canada after being deported. The referral of such offences to the RCMP is time-consuming and inefficient.

(i) A New Approach to Minor Offences

Provisions exist under the *Contraventions Act* to create a "ticketing" system for minor contraventions of the law. Under the provisions of that Act, an administrative officer, such as an immigration officer, could issue tickets to offenders. Under such a scheme, immigration officers noting minor offences, such as a foreign student working without authorization or failing to attend an approved course of study, illegal employment of a foreign worker, or short-term failure to maintain a sponsorship agreement, would have the option of issuing a ticket on the spot, which would establish that a fine must be paid. Such a scheme would free up RCMP resources for the investigation of more serious offences such as people smuggling.

RECOMMENDATION 140

The Minister of Citizenship and Immigration should investigate the possibility of providing for a "ticketing system" under the *Contraventions Act* which would allow immigration officers at ports of entry and inland to deal administratively with minor violations of the Immigration and Citizenship Act.

(ii) People Smuggling

In the past few decades, people smuggling has become one of the largest, most profitable international organized crime activities, trading in human misery. Billions of dollars in profits are made every year. The risks are few for the smugglers, who face little chance of being caught, and small penalties if they are.

To combat this menace, we would like to see a renewed effort on the part of the federal government to investigate and thwart people smugglers both in Canada and in other countries. Much of the RCMP immigration resources are currently involved with minor violations. We would like to see a major shift towards the investigation of people smugglers, and we believe that the RCMP will require enhanced legislative powers to set about this task.

The provisions dealing with people smuggling in the current Act are restrictive since prosecutions cannot proceed without the consent of the Attorney General of Canada. These restrictions were put in place to protect well-meaning persons and organizations who assisted refugee claimants in entering Canada for the purpose of making a claim. However, it takes time to obtain the authority of the Attorney General, often days or weeks. We believe that the RCMP can distinguish between well-meaning citizens and criminals who are making a profit. The law should reflect this fact so that the RCMP can undertake its work effectively.

RECOMMENDATION 141

Where people smuggling is involved and where there are reasonable grounds to believe that financial gain to the smuggler is a factor, the Immigration and Citizenship Act should allow for the institution of proceedings for an offence without having to seek the personal consent of the Attorney General of Canada or the Deputy Attorney General.

All too often when smugglers are caught, the courts give out a minor fine or a short prison sentence and the smugglers keep the profits. The *Criminal Code* allows for the seizure of assets where criminals have made a profit from certain crimes. Given the large profits being made by people smugglers, the law should provide for the seizure of profits made in bringing people illegally to Canada.

RECOMMENDATION 142

The proceeds of crime provisions of the *Criminal Code* should be amended to allow for the forfeiture of the assets of people convicted of people smuggling under the Immigration and Citizenship Act.

There are currently no specific inadmissibility provisions dealing with people smugglers. We recommend that the use of Canada as a base or destination for people smuggling be hindered in every way possible. To this end, we recommend that persons who are known to be involved in people smuggling for financial gain be denied admission to Canada or deemed subject to removal from Canada.

RECOMMENDATION 143

The Immigration and Citizenship Act should contain a provision that where there is reason to believe that a person is a smuggler of people for financial gain, that person should be inadmissible to Canada.

8.8 Achieving Compliance through Partnerships

It is important to avoid falling into the trap of thinking that a single piece of legislation can by itself protect the health, safety and good order of Canadian society and promote order and justice. International problems such as people smuggling, money laundering, drug trafficking, terrorism and organized crime are not problems that can be addressed by one country alone.

(i) Working Internationally towards a Common Goal

Just as international and/or regional schemes for identifying and sharing in the protection of refugees will be required in the long term, so too will international initiatives be required if effective mechanisms are to be developed to address the problems we have highlighted. There is nothing new in this, and we are aware of many different information-gathering and -sharing initiatives in which Canada is involved, such as the Inter-Governmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia (IGC); the International Organization for Immigration (IOM); the International Civil Aviation Organization (ICAO); various European Community initiatives; and the International Air Transport Association, Control Authorities Working Group (IATA CAWG), to name a few. It is essential for participating countries to strengthen information-sharing mechanisms and to apply common policies and approaches to shared problems. We encourage the department to continue to take a leading role in such forums.

One problem which requires a concerted international effort is that of obtaining the cooperation of foreign governments in providing travel documents to their citizens. Some countries are not willing to accept their international obligations, and routinely refuse requests for travel documents. This makes removal virtually impossible. Several incidents that have undermined public confidence in Canada's border and entry controls have involved persons whose removal could not be effected because of the unwillingness of a foreign government to provide travel documents.

There are no easy answers to this problem. While the department has pursued, and has successfully concluded, a number of bilateral agreements on this issue, the problems persist. Many of the submissions we received on this issue proposed well-intentioned but simplistic, and ultimately counter-productive, solutions. We consider that this is one area where much could be achieved through a concerted international effort. Successful strategies should be shared, and approaches to governments reluctant to cooperate would be much more effective if they were undertaken on a multilateral basis.

We believe that this is a matter of national importance that should be addressed quickly in order to maintain the integrity of the immigration system. The Minister of Citizenship and Immigration and the Ministers of Foreign Affairs and International Trade should work together to find solutions to this problem.

RECOMMENDATION 144

The Minister of Citizenship and Immigration and the Ministers of Foreign Affairs and International Trade should jointly establish new priorities to encourage cooperation from other countries in issuing travel documents and accepting the return of their nationals.

(ii) Information Exchange

Examination officers at ports of entry need greater access to information on persons convicted of, or charged with, criminal activities in foreign jurisdictions. This is particularly true with regard to our land border with the United States. If we expect immigration officers at our ports of entry to keep criminals out of Canada, we must give them the tools. They need up-to-date, readily available information on criminals arriving at our ports. Recently, we have noted the development of an improved relationship between Canadian and American authorities focused on finding ways to resolve common border problems. We would like to see this continue, with greater emphasis on the sharing of information on criminals. Similarly, greater cooperation is required among the various orders of government in Canada and among the different departments dealing with these issues.

RECOMMENDATION 145

The Immigration and Citizenship Act should provide enhanced powers for Canada to exchange information with other countries with respect to criminality issues. The focus should be on working closely with other countries, and most especially with the United States of America, to find mutually acceptable solutions to the criminality issues arising both from sharing a common border and from the increase in the volume of international travel. The focus should also be on developing advanced systems to facilitate the sharing of this information.

(iii) Working with the Transportation Industry

The transportation industry is a key partner in the endeavour to achieve compliance. The industry already works very closely with the department to this end. Canada is at the forefront of international best practices with regard to its approach to violations of the Act by transportation companies, and it is one of very few countries to have adopted anything other than a zero tolerance policy towards such violations.

Yet, there remain significant differences in the respective positions regarding the extent to which the transportation companies should bear the responsibility and the costs for the passengers they bring to Canada and the facilities required to process their entry. The department's approach implies that the transportation companies are the only beneficiaries of this large-scale movement and ignores the much wider benefits to Canada. The transportation industry sees itself as a hostage to a government policy to reduce costs and generate revenue in any way it can. It points to the significant implications of privatization and the sale of airports, and to the opportunity cost of facilities it must provide to the government free of charge that could be used for commercial purposes. The government points to its dilemma in having to process an ever-increasing number of international arrivals in an environment of diminishing resources.

We believe that there is, in fact, a balance in the policies at present which is fair to both sides. We would be reluctant to recommend any major shift in the balance without more study of the issue. We also believe that the legislation should place more emphasis on the overlapping goals of the industry and the department, which are the key to the success of the relationship.

At the same time, we were able to identify some issues which do need addressing. One is the fact that other mechanisms will be required in the future to permit faster and easier processing of low-risk passengers. The alternative will be clogged ports of entry and long queues at airports. Innovative powers will be required to allow for greater flexibility in exempting persons from the requirement to present themselves for examination. For example, persons on flights to Canada could be pre-cleared by an authorized person in a specified foreign country.

RECOMMENDATION 146

The Immigration and Citizenship Act should include a provision which would authorize examinations and conclusive decisions, to approve or deny entry, to be made outside of Canada.

Currently, the transportation companies are responsible for all costs of removal of improperly documented passengers they have brought to Canada. These costs may be incurred no matter how long a person has stayed in Canada. We consider that there should be a limitation period on the liability of transportation companies for removal costs. The government needs an incentive to make decisions quickly. It must accept that failure to do so is a pull factor for illegal immigrants. Transportation companies cannot be expected to bear the costs of government inefficiency. We believe that a limitation of 18 months would provide ample time to decide on a person's status in Canada and to make any necessary travel arrangements. Anything beyond that must be seen as the responsibility of the government.

RECOMMENDATION 147

The Immigration and Citizenship Act should continue to require that transportation companies be liable for removal costs of improperly documented passengers they have brought to Canada. However, there should be a time limitation on this liability which should not exceed 18 months from the date of arrival in Canada of an inadmissible person.

The current *Immigration Act* states that transportation companies must provide detention for persons ordered removed, or allowed to withdraw from a port of entry, until that person can be removed. Often, a period of several days passes before removal can be effected. The transportation companies have complained, with reason in our opinion, that they are not equipped for detaining persons. Often, companies must find *ad hoc* detention facilities and guards on short notice. The results are often sub-standard facilities and inexpert treatment of persons detained. It is our belief that the government must accept greater responsibility in this area and work with the transportation companies to make adequate arrangements. We are recommending that the companies have the option of paying the government for detention costs where the government makes all detention arrangements.

RECOMMENDATION 148

The Immigration and Citizenship Act should provide transportation companies with the option of paying the government for costs in lieu of providing detention facilities themselves where they are required to detain and safely guard a person who is ordered removed from Canada.

A peculiarity of the present *Immigration Act* is the requirement that transportation companies must bear all costs of removal and that they cannot charge any costs to the person being removed. This has been interpreted to mean that companies must refund the unused portions of return tickets to people being removed. This is neither fair nor in line with international practice. It is our view that transportation companies should be able to recover costs of transportation in all cases. It should be made very clear that no action by a transportation company to pursue such costs would have any impact on a person's status in Canada and should under no circumstances delay removal from Canada once ordered.

RECOMMENDATION 149

The Immigration and Citizenship Act should not preclude a transportation company from recovering from an inadmissible person any transportation costs arising from that person's inadmissibility.

8.9 Other Issues

(i) Statutory Stays on Removal

Under the *Immigration Act,* the execution of a removal order is stayed while a person in Canada appeals the relevant decision or, in the case of a refugee claimant, files an application for leave to commence judicial review proceedings under the *Federal Court Act.* The stay continues until the appeal or proceedings have been finally determined. Execution is also stayed where it would directly result in the contravention of any other order made by any judicial body in Canada, and until the person has completed any term of imprisonment. These are referred to as statutory stays.

This is a highly technical area, and the majority of the submissions on this subject were also highly technical. Some pointed to what were seen as unintended consequences of the current stay provisions,

especially those relating to other judicial or criminal proceedings. Others suggested that statutory stays of removal were being abused by persons seeking only to delay their departure from Canada, and should therefore be restricted. Others merely pointed to the complexity of the provisions and submitted that they be rewritten in plain, clear and precise language.

We have proposed a flatter structure for making decisions on alleged violations of the Act, and in the next chapter, we will describe a streamlined approach to the review of such decisions. This should go some way in addressing some of the concerns alluded to earlier.

The various stay provisions need to be carefully reviewed in order to eliminate unintended consequences where other judicial or criminal proceedings are involved, and to present them in precise, plain language There is also a need to put an end to those situations where removal orders are stayed without any legislative authority.

Although the current Act does not provide for a statutory stay on removal where a person other than a refugee claimant has filed an application for leave to commence a judicial review under the *Federal Court Act,* removal action is not currently being taken under such circumstances. We heard that this reluctance to execute the removal order in such circumstances was due to concern that the federal court may find the department to be in contempt of court for having removed the person. This concerned us, as such a view is not, in our opinion, supported by the stay provisions of the Act. Just as a person should not be removed if there is a stay on removal, so should a person who has been ordered removed, be removed if there is no impediment to removal. We consider that an application for leave to commence a judicial review should constitute a statutory stay only where the person is seeking judicial review of a decision to refuse protected person status or to revoke landed immigrant status. In other circumstances, the removal order should be executed and, should the order be subsequently set aside, the person should be returned to Canada at the expense of the Minister in accordance with the specific provision that already exists.

RECOMMENDATION 150

The Immigration and Citizenship Act should provide for a statutory stay on removal on the basis of an application for leave to commence a judicial review, under the *Federal Court Act,* only of decisions to refuse protected person status or to revoke landed immigrant status. The Act should clarify that, in all other cases, an application for leave to commence a judicial review would not result in a stay of removal. In the event that a person removed from Canada was subsequently successful in having the decision set aside, the Government of Canada would assume all costs for returning that person to Canada.

(ii) The Advisory Committee on Country Conditions for Removals

The Minister of Citizenship and Immigration presently maintains a list of countries to which removal is considered too dangerous. This list exists for policy reasons only as there is no legislative basis for it. The list is established administratively by a committee of officials of Citizenship and Immigration Canada known as the Advisory Committee on Country Conditions for Removals. At the time of writing, the list contained Afghanistan, Algeria, Burundi, Rwanda and Zaire. The list is changed as country conditions change.

The Committee considers a number of information sources, including reports from Citizenship and Immigration Canada and Foreign Affairs and International Trade posts abroad; non-governmental organizations such as the Canadian Council for Refugees and Amnesty International; and international organizations such as the Office of the United Nations High Commissioner for Refugees and the International Organization for Migration. It also consults published materials that are publicly available.

We are concerned with the lack of transparency in the process. Given the seriousness of the decisions taken by the Committee, it is imperative that the authority of the Minister to establish moratoria on removals be specified in the Act, and that the membership of the Committee, the criteria it uses and its operating procedures be clearly prescribed.

RECOMMENDATION 151

The Immigration and Citizenship Act should include a provision that enables the Minister to place a moratorium on removals to certain countries because of unfavourable conditions. The Act should provide for such decisions to be made on the advice of a committee for which the membership and the decision-making criteria are prescribed in the immigration Regulations, and whose operating procedures are described in the User Guide.

(iii) Pre-Removal Risk Assessment

The federal court has recognized the need to screen persons prior to removal with a view to assessing the risk they might face in the country to which they are to be returned. This is especially important where a delay has occurred between any early decision on risk and the proposed date of removal. The need for this review is also in keeping with Canada's international obligations regarding *non-refoulement.*

We envisage a risk assessment for which any person subject to a removal order could apply. It is important that this assessment occur reasonably close to the anticipated time of removal and that it be decided on quickly. Further delay can lead to the need for further risk assessments. The department must be ready to enforce removals quickly.

Persons subject to removal should be given sufficient advance warning of the impending removal. Upon receipt of notification of date, time and destination of a person's removal, that person, who would have access to counsel and non-governmental organizations, could request a risk assessment. The person would be given 48 hours to submit an application for risk assessment by a Protection Officer of the protection agency. The application would automatically stay the execution of the removal order.

The assessment would be a paper review of changed circumstances since arrival in Canada or since the last protection decision, based on a reasonable possibility of risk to the applicant's life in every part of that country to which the person is to be removed in accordance with Canada's *non-refoulement* obligations. The assessment should be conducted immediately after the person has filed the application for risk assessment so that it would not unnecessarily delay removal. The applicant could have access to information through non-governmental organizations. Notification of the decision would be in writing within one week of the interview. Where persons are found to be at risk, removals would be stayed. Persons found not to be at risk would be removed as quickly as possible after the risk assessment applications are rejected.

Where there is evidence that persons are excludable for reasons of war crimes, crimes against humanity or serious criminality, removal would proceed, notwithstanding a finding that the person might be at risk. This is in accordance with the exclusion provisions of the Geneva Convention.

RECOMMENDATION 152

The Immigration and Citizenship Act and the Protection Act should establish a right to a pre-removal risk assessment on application for all persons facing removal from Canada. The applicant should be given 48 hours to submit such an application to the protection agency. This application should serve as a stay on removal until decided on by the protection agency.

(iv) Operating Environment and Departmental Procedures for Removal

The Tassé report[3] examined the operating environment and departmental procedures and practices relating to the removal of persons from Canada. We received a lot of positive feedback about this report during our consultations. While some of its recommendations have been implemented by the department, many have not. The department's response does not appear to have addressed public concerns about the fairness and effectiveness of the removals function.

We consider that the Tassé recommendations are compatible with broader directions we have taken throughout this report. They also link closely with the views we have expressed on the importance of training, systems and accountability. We have

3 Roger Tassé, "Removals: Processes and People in Transition," Ottawa, unpublished, 1996.

therefore set out below those recommendations from the Tassé report which we feel bear repeating.

Mission Statement

- The purpose and function of removals need to be more clearly defined. Citizenship and Immigration Canada should strive towards a better and clearer common understanding and broader consensus on the *raison d'être* or purpose of the function.

Accountability

- Statistical data on removal activities should be collected and made available to the public;
- Citizenship and Immigration Canada should identify the departmental person or persons responsible for looking into and dealing with complaints about the handling of removals;
- Annual reports on complaints should be made public;
- Consideration should be given to expanding the authority of the RCMP Public Complaints Commission to review complaints made against removal officers.

Ethics

- A code of ethics for removal officers should be developed.

Selection, Training and Deployment of Removal Staff

- Recruitment and selection of removal staff need to be done with [departmental] core values in mind.

Communications

- Removal staff and NGOs should meet on a regular basis to exchange information on general policy and program matters;
- Access to clients' files, case tracking and general file management should be improved to facilitate communications between Citizenship and Immigration Canada and NGOs, as well as within the department;
- Citizenship and Immigration Canada should examine its communication strategy [with the media] with a view to being more proactive in providing information to the public on removal functions.

RECOMMENDATION 153

The Minister should verify the implementation of the recommendations in the Tassé report, entitled "Removals: Processes and People in Transition," with respect to the mission statement; accountability; ethics; selection, training and deployment of removal staff; and communications.

RECOMMENDATION 154

The annual report to Parliament should include data on exclusion, removal and deportation orders issued in the relevant year. The report should describe the number of persons involved, their nationalities and status in Canada, and the grounds for the order, as well as the number of removal orders appealed or stayed, including the age of outstanding orders, and the reasons why they were not executed.

(v) Detention and Removal as Issues of National Interest

In this chapter, we have described a simpler, more transparent legislative structure that will make the consequences of behaviour that contravenes the Immigration and Citizenship Act much clearer both to the public and to the department's clients. But the concerns of the public are much wider and not restricted to issues that can be addressed in a legislative review. To date, as highlighted in this chapter, legislative changes to strengthen the enforcement powers of the Act have not assuaged public concerns. Detention and removal of serious criminals will be one benchmark by which the government's performance will be judged.

The public needs to understand the wider dimensions of compliance activities, such as the consequences of having screening mechanisms to enforce a zero tolerance policy, and the trade/foreign policy implications of taking a more aggressive stance towards countries that do not meet their international obligations to provide travel documents to their nationals. These issues must be addressed in the larger context of Canadian society, and Canadians should understand that they do not just concern newcomers to Canada.

If public confidence is to be restored, there needs to be a wider public debate of the difficult issues involved. It is our view that a broader public forum for these issues would be best achieved through referral to the House of Commons Standing Committee on

Citizenship and Immigration. We envisage the calling of witnesses from both inside and outside the government, the collection of data, and the issuance of a special report.

RECOMMENDATION 155

Given the high level of public concern and the need to restore public confidence in detention and removal from Canada, these issues should be referred to the House of Commons Standing Committee on Citizenship and Immigration for consideration.

Chapter 9

Reviews: Simple, Fair and Timely

9.1 Resolution and Review Procedures

Many laws offer remedies before a review board or an administrative tribunal to a person who is dissatisfied with a decision. The *Immigration Act* is no exception, providing access as it does to both appeal and review procedures.

In this chapter, we deal with the resolution and review procedures under the proposed Immigration and Citizenship Act. Appeal procedures concerning protection matters are treated separately in Chapter 7.

In our view, it is critical that people affected by decisions should be able to have contentious decisions quashed or amended and that time limits for seeking review are clearly established to ensure the fairness of the administrative system. Review procedures make it possible to correct questions of fact or law and to foster greater consistency in decision making. Time limits for reviews are fair to the extent that they apply equally to all parties involved.

9.2 Guiding Principles

Review procedures would appear to be a matter of pure mechanics. However, underlying those mechanics are certain principles. We have sought to: 1) respect the rule of law and the Objectives of the Act; 2) simplify procedures; and 3) adapt the procedures to the nature of the case.

Some of the procedures we recommend flow from the fundamental requirements of administrative law and the Charter of Rights and Freedoms. For example, detention orders must be reviewed within 48 hours, then after seven days, and every 30 days thereafter. Review procedures must also conform with the stated Objectives of the Immigration and Citizenship Act. Further, one of the goals of our proposed system is to encourage applicants to cooperate with the authorities designated by law and to disclose all the information relevant to their case from the outset.

(i) Simplifying Procedures

The current system provides for a number of remedies that can be used successively and that often cancel each other out. This is true, for example, in the case of the discretionary authority of the Appeal Division, which allows it to go beyond a review of the legality of a decision and consider humanitarian factors not at issue in the initial decision. The need, in our view, is to improve the quality of initial decisions rather than increase the number of review mechanisms. The need is to strengthen first-level staff and make it a priority to give them the training, administrative support and tools required.

The decision-making process should be simplified by redefining the review function according to the complexity of the case and the nature of the rights affected. Accordingly, we propose that, in most cases, review should be limited to the grounds on which the initial decision was based. In our view, simplifying review procedures does not mean eliminating them.

(ii) The Nature of the Case

The more complex and contentious the issues needing resolution become, the more the law recognizes rights that can be affected by the decision, and the more the system must furnish guarantees. Those guarantees may vary depending on the issue, the level of difficulty involved in analysing the facts and the legislation, and the nature of the rights.

For example, the decision to deny entry to a person who arrives at a port of entry without a passport or visa will be final. The nature of the case is simple: either the person has the necessary documents or not. Similarly, any person other than a landed immigrant found guilty of a criminal offence in Canada will not be entitled to a review because his or her conviction is not open to interpretation. The right to review will be granted, however, in cases where a person has been convicted outside Canada of an offence for which the status determination officer has found an equivalent in Canadian legislation.

The type of first-level decision will influence the choice of mechanism for settling the dispute. There are several mechanisms, ranging from negotiation to intervention. We are grateful to the Immigration and Refugee Board for suggesting alternative dispute mechanisms. We are proposing two approaches: mediation and binding arbitration.

Mediation is a mechanism designed to foster full disclosure of both agreed-upon and contentious facts to work towards agreement between the parties. Under our new system, current appeals related to sponsorship refusals could be treated quickly and efficiently by the arbitrator through the use of mediation.

Where the legal and factual issues do not lend themselves to agreement through mediation, we propose to entrust the arbitrator with the task of settling such disputes through a binding decision.

RECOMMENDATION 156

The review and resolution procedures, while streamlined, should conform with the Objectives of the Act and the rule of law. They should vary according to the nature of the dispute and make use of such settlement techniques as mediation and binding arbitration.

9.3 Reform of Current System

In reforming the current system, we propose that the officers with resolution and review powers under the Immigration and Citizenship Act be grouped in one branch of the department which would enjoy a considerable degree of independence.

The resolution powers are not, strictly speaking, an alternative to the traditional dispute settlement mechanism since access to the courts is not eliminated. Instead, the idea is to have recourse to certain mechanisms to find a solution promptly rather than impose the decision after a lengthy wait and expensive litigation.

The resolution procedure also stresses active participation by all parties involved, particularly information sharing. Thus, the department must act quickly to forward the information relevant to the dispute, while decision makers must be more proactive in gathering information.

We propose a Resolution and Review Branch that would have exclusive jurisdiction over:

- arbitration of refusals of sponsorship on financial grounds;
- arbitration of refusals of landing on medical grounds;
- review of refusals of landing for failure to meet the relationship requirements;
- examination of applications for relief from sponsorship undertakings on grounds of physical or psychological abuse;
- reinstatement of persons who are not eligible to sponsor; and
- review of refusals of entry, refusals to grant provisional status, or revocations of landed immigrant or other status.

For practical reasons, we do not think it is a good idea to separate the Resolution and Review Branch from Citizenship and Immigration Canada. However, we do think it should be given considerable independence, especially with regard to administrative autonomy, allowing the Branch full authority over case management.

To perform its functions, the Resolution and Review Branch will be composed of specialists in various fields. The level of specialization will vary with the issues to be handled.

Officers and arbitrators of the Resolution and Review Branch will have a good knowledge of the various dispute settlement techniques and experience in decision making requiring analysis of complex issues. They will have to be sensitized to possible imbalances between the parties and to cultural differences.

We emphasize the necessity of giving staff of the Resolution and Review Branch thorough and ongoing training, as well as solid support services. In addition, we consider it essential for the officers to have special knowledge of the matters they must handle. For example, an arbitrator settling a dispute concerning a sponsored applicant's state of health, possible excessive costs on health or social services, or possible danger to public health or public safety, should have knowledge of those areas.

Employees of the Resolution and Review Branch will ensure that the necessary documentation is provided in a timely manner so that the officers can begin to deal with the parties and resolve the issues expeditiously. In their work on procedure for administrative tribunals, R. Macauley and J. Sprague stressed the importance of providing decision makers with the necessary support staff: "What is essential to realize is that a tribunal has a duty to provide a balanced record, to test every assumption, to challenge every impact and wring out every issue. No tribunal can wait for the apple to fall. It must shake the tree. This balance is obtainable through the active participation of staff in the hearing process."[1]

In several places in our report, we have proposed measures to help eliminate gender bias. For example, we recommended cancelling or prohibiting sponsorship in cases where the sponsor is convicted, or even strongly suspected, of spousal or family violence. In the time available, we were unfortunately unable systematically to check the effect of our recommendations on equality between the sexes. Citizenship and Immigration Canada should undertake such an analysis before formulating its policy, revising the Act and Regulations and establishing its programs.

RECOMMENDATION 157

Officers with dispute resolution powers and authority to review decisions made under the Immigration and Citizenship Act should be grouped together in a branch of the department where they have the requisite degree of independence.

(i) Refusal of Landing or Sponsorship

Current legislation grants the right to appeal when applications for landing or sponsorship are refused on financial or medical grounds, or because the applicant does not fulfill the requirements for membership in the Family Class.

In order not to distort the purpose of the review, we think it is essential that applicants be completely open and cooperate with the authorities at the first level. Otherwise, they should not have access to the review procedure. They would not be denied all recourse since they could still file an application for leave for a judicial review with the federal court.

The reasons for which a first-level officer may decide that an applicant has failed to cooperate will be listed in the User Guide. Such reasons could include a systematic failure to meet the deadlines set out in the Act and Regulations to submit the necessary documents.

RECOMMENDATION 158

The Immigration and Citizenship Act should include a provision whereby a person who systematically fails to cooperate in the immigration process should be denied the right to file an application for resolution or review of a refusal of an application for sponsorship or landing.

(ii) Refusal on Financial Grounds

A refusal of sponsorship on financial grounds means that the sponsor cannot fulfil his or her obligations and has not taken the necessary steps to ensure the settlement of the applicants. This decision requires financial rather than legal expertise and is well suited to a quick review because the issue is clear-cut. We propose that an arbitrator be made responsible for settling disputes in respect of Family Class tiers one and two. Moreover, initial decisions to refuse sponsorships should be made by the officers who consider sponsorship applications in Canada, without requiring the sponsored person to submit an immigration application. This would avoid having to transfer the file to the visa officer unnecessarily and to have the sponsored person make a landing application when the application has no chance of success.

The parties would agree on the outcome or, in the event of disagreement, a decision would be imposed by the arbitrator. Only questions of fact would be considered. The arbitrator would control the procedure and would determine time frames other than those set out in the Act and Regulations. The arbitrator would not have the discretionary authority currently invested in the Appeal Division to decide on humanitarian or special grounds.

1 R. Macauley and J. Sprague, *Practice and Procedure before Administrative Tribunals* (Scarborough: Carswell, 1994), 12-14.

Sponsors would have to indicate their intention to go to arbitration within 30 days of refusal of an application. They could file in evidence any relevant document or statement not available at the time of the initial decision.

Arbitration would adhere to the principle of procedural fairness, and the decision would be subject to judicial review by leave.

RECOMMENDATION 159

If an application for sponsorship is refused on financial grounds, sponsors of spouses, dependent children, fiancé(e)s or parents should have recourse to an arbitration procedure limited to questions of fact. The arbitrator should have financial expertise and be a member of the Resolution and Review Branch of Citizenship and Immigration Canada.

(iii) Refusal on Medical Grounds

Some of our recommendations concerning the family and the application of the Act will result in a decrease in the number of disputes relating to medical admissibility. For example, we have suggested that the notion of "excessive costs on health or social services" be clarified and that it not apply to spouses and dependent children of Canadian citizens or landed immigrants.

The new procedure for reviewing refusals on medical grounds will emphasize full disclosure of information relevant to a case and the reasons for the refusal. It will also allow the sponsor to produce a second opinion. The sponsor will have recourse to a form of arbitration similar to that described for refusals on financial grounds, but the arbitration will cover questions of fact or law, or mixed fact and law. The arbitrator will be required to have experience as a professional in a related field. The arbitrator will control the procedure and time frames other than those prescribed by the Act or Regulations, and will be a member of the Resolution and Review Branch.

RECOMMENDATION 160

In the event of a refusal of a sponsorship application on medical grounds, sponsors of spouses, dependent children, fiancé(e)s or parents should have recourse to an arbitration procedure covering questions of fact or law, or mixed fact and law. The arbitrator should have expertise in a related field and would be a member of the Resolution and Review Branch of Citizenship and Immigration Canada.

(iv) Refusal on Grounds of Invalid Relationship

Visa officers may refuse a landing application where they are not convinced of the validity of the relationship between the sponsor and applicant. This generally occurs in cases of adoption (e.g. where the requirements for adoption have not been met), marriage (e.g. where the visa officer suspects that the marriage is one "of convenience"), or dependent children (e.g. where the visa officer is of the opinion that the applicant does not meet the definition under the Act).

It is necessary here to bear in mind our recommendations amending the definition of the family. Under the new Family Class, applicants would be: (1) spouses and dependent children; (2) fiancé(e)s, parents and (if parents are deceased) grandparents; and (3) relatives or close personal acquaintances of the sponsor's choice. "Spouse" would be defined as: (1) a partner through a marriage legal in the jurisdiction in which it occurred, or (2) a partner of the other or same sex in an intimate relationship, including cohabitation of at least one year in duration, with the burden of proof resting on the applicant in either case. The current definition of dependent child would be replaced with the simpler criterion of an unmarried child under 22 years of age, unless the child is dependent by reason of a physical or mental disability.

Sponsors of applicants in the first and second tiers of the Family Class could seek review from a review officer of the Resolution and Review Branch of a refusal by a visa officer. The application for review would have to be submitted within 30 days of the decision. Sponsors of applicants in the third tier would have no right of review but could seek judicial review by leave to the federal court.

The review would be an administrative paper review and would deal with the legality of the relationship. It would take into account questions of fact or law, or

mixed fact and law. The review officer could call witnesses and have them testify either orally or in writing and produce any documents or other evidence deemed relevant. The sponsor could, moreover, file any relevant evidence not available at the time of the initial decision.

Highlights of arbitration and review procedures relating to Family Class sponsorship are provided in Table 9.1 at the end of this chapter.

RECOMMENDATION 161

In the event of a refusal of a landing application on the grounds of an invalid relationship between a sponsor and an applicant in the first or second tier of the Family Class (spouse or common-law spouse, same-sex partner, dependent child, fiancé(e) or parent), the sponsor should have the right to seek review by a review officer of the Resolution and Review Branch. The review should be based on questions of fact or law, or mixed fact and law.

(v) Other Appeals Involving Sponsorship Cases

In Chapter 5, we recommended that a review officer rule on applications for relief from sponsorship obligations. Physical or psychological abuse should constitute sufficient grounds to cancel a sponsorship undertaking. A victim of abuse who has signed a sponsorship agreement could ask to be released from it. Sponsored immigrants or the sponsors or guardians of dependent children could also ask to have the agreement cancelled.

The applicant would have to prove, on a balance of probabilities, that abuse has taken place. The evidence could include incidents recorded in a police file or a medical file; the use of social services such as women's shelters or support centres; or written or oral testimony. The review officer would be able to subpoena witnesses or documents, administer oaths and question witnesses under oath, and take any other action necessary for a full hearing on the case.

We have recommended that anyone who is convicted of spousal abuse or domestic violence be prohibited from sponsoring for five years, and thereafter only upon evidence of rehabilitation. After the five-year period, the person will have to submit a rehabilitation application to the Resolution and Review Branch.

9.4 Refusal of Entry and Revocation of Status

In Chapter 8, we dealt with the procedure for revoking the status of persons deemed inadmissible on medical, financial or criminal grounds or because they posed a potential threat to national security or to the integrity of the system. The principles set out at the beginning of that chapter serve as the basis for the design of the review system. Our goal is a system that, while simple, guarantees the rights of applicants and suits the nature of the cases involved.

A review officer from the Resolution and Review Branch would re-examine decisions in cases where a status determination officer refuses entry or revokes status. Applicants entitled to review would be invited to forward the documentation relevant to their case within a specific time frame. All documents, including the file on which the first-level officer based the decision, would be made available to the review officer, who could require further information and hold an interview before giving the decision. The review officer could uphold the first-level officer's decision, make the decision the first-level officer could have made, or dismiss the application for review. The application for review should be submitted within thirty days of the initial decision.

The review officer would also consider cases where landed immigrant status was revoked for failure to satisfy the conditions for renewal, such as proof of physical residence in Canada.

RECOMMENDATION 162

Applications for review of decisions to refuse entry or revoke status should be submitted to a review officer of the Resolution and Review Branch. The review officer could request further information and/or hold an interview, depending on the circumstances.

In cases where an applicant who is not a landed immigrant is refused entry, the review would be limited to questions of law or fact, or mixed law and fact. In cases where landed immigrant status is revoked, the review would also weigh the immigrant's contribution to Canada and family responsibilities against the grounds for revocation. The criteria for evaluating the contribution to Canada, and the definition of family responsibilities would be clearly

set out in the User Guide for use by officers and clients. Landed immigrants would be entitled to a review in every case, unless a security certificate has been issued or, in the Minister's opinion, they represent a danger to the public. Persons who have had their landed immigrant status revoked by a visa officer abroad would be entitled to a temporary visa allowing them to present their case to a review officer in Canada.

Table 9.2 shows the system we propose.

RECOMMENDATION 163

The Immigration and Citizenship Act should give landed immigrants the right to a review when status is revoked, unless a security certificate has been issued or, in the Minister's opinion, they represent a danger to the public. This review should consider questions of law or fact or mixed law and fact, and weigh the applicant's contribution to Canada and family responsibilities against the grounds for revocation of status.

9.5 Danger to the Public

The procedure whereby the Minister may declare a person to be a danger to the public would remain the same, although we would like to see the criteria become more transparent. The existing procedure is set out in an administrative memorandum for decision makers and immigration officers. We recognize that it is important for the Minister to have the power to decide that a person is a danger to the public, and we would not want to unduly limit the exercise of this power. Nevertheless, we believe that the concept of "danger to the public" should be based on criteria set out in the Regulations. We have already made a recommendation that the Minister report on cases of danger to the public in the annual report to Parliament.

RECOMMENDATION 164

Without limiting the power of the Minister to decide that a person is a danger to the public, the criteria for cases of this nature should be set out in the immigration Regulations.

9.6 Detention Review

Current legislation provides that an immigration officer may order the detention of a person where, in the officer's opinion, the person is a danger to the public or may not comply with a summons to appear or a removal order. A detention order is generally issued at a port of entry if a person is unable to prove his or her identity or is considered to be a danger to the public. The person detained must appear before an adjudicator within 48 hours for an initial review of the detention order. After hearing the grounds for the detention and the detained person's arguments, the adjudicator may unconditionally release the person, release the person on bond or subject to other conditions, or uphold the detention order. In the latter instance, the person detained has the right to a further review of the detention after seven days and every 30 days thereafter.

Under the system we are proposing, the only grounds for detention would be lack of status and refusal of provisional status. Provisional status would be granted to any person who met the requirements set out in the legislation. Detained persons would have to demonstrate that they meet these conditions in order to be released. The review officer would reconsider the refusal of provisional status on the basis of the same criteria as those used by the officer who made the initial decision. Existing provisions respecting the frequency of detention reviews would remain unchanged.

RECOMMENDATION 165

A review officer should review any refusal of provisional status within 48 hours. Provisional status should be granted to any detained person who meets the requirements, thereby ending the detention. The existing frequency of detention reviews should be maintained.

9.7 Time Frames

We have more than once stressed the need for the applicant to file all relevant documents at the start of the procedure. We believe that this principle applies to both parties and that the review officer and the arbitrator should also respect prescribed time frames.

RECOMMENDATION 166

The Immigration and Citizenship legislation should impose specific time frames for both the review officer and the arbitrator, and the applicant. The applicant should file the review application within 30 days of the decision, and the review officer or the arbitrator should render the decision within six weeks of receipt of the application.

9.8 Judicial Review

We consider that all decisions made under both the Immigration and Citizenship Act and the Protection Act should be subject to a leave application for judicial review by the federal court. However, time frames for serving and filing sworn statements, notices of motions and documents relating to applications for immigration or requests for asylum should be extended.

Most decisions made by immigration officers are protected from frivolous litigation by a screening mechanism: the application for leave for a judicial review. The only decisions not afforded this protection are the decisions of visa officers abroad. Their refusals to issue permanent or temporary visas are increasingly being challenged by applicants abroad, and cases can be heard immediately, even when no serious or arguable issues are involved. It is paradoxical that persons outside Canada have greater access to Canadian courts than persons in Canada who are subject to removal. The decisions of visa officers should be protected by the same constraints as the decisions of other immigration officers.

RECOMMENDATION 167

The decisions of visa officers should not be open to challenge unless an application for leave for a judicial review is approved. Time frames for serving and filing leave applications should be extended to 30 days.

Table 9.1 Review : Refusal of Family Class Sponsorship Applications

	Tiers 1 and 2 (spouses, dependent children, parents, fiancé(e)s)			Tier 3 (Others)
Type of Refusal	**Financial Grounds**	**Medical Grounds**	**Legality of Relationship**	**All Grounds**
Review jurisdiction	Arbitrator, Resolution and Review Branch	Arbitrator, Resolution and Review Branch	Review officer, Resolution and Review Branch	Federal court, with leave
Type of review	Binding arbitration	Binding arbitration	Administrative review, with authority to call witnesses	Judicial review
Time frame	30 days following decision	30 days following decision	30 days following decision	Already prescribed
Grounds	Questions of fact	Questions of fact or law, or mixed fact and law	Questions of fact or law, or mixed fact and law	Review of legality of decision (18.1(4) of *Federal Court Act)*
Decisions	Affirming the decision Rendering the decision Denying a review	Affirming the decision Rendering the decision Denying a review	Affirming the decision Rendering the decision Denying a review	Affirming the decision Quashing the decision Referring the matter back to the decision maker, with instructions

Table 9.2 Review: Inadmissibility Grounds

	Determination of Status	Review by Review Officer	Review Grounds	Comments
CRIMINALITY				
Convictions in Canada				
Landed Immigrant	Yes	Yes	Law, Fact and Balance	No right of review if "danger" certificate is issued
Other	Yes	No	–	
Convictions outside Canada				
Landed Immigrant	Yes	Yes	Law, Fact and Balance	No right of review if "danger" or security certificate is issued
Other	Yes	Yes	Law and Fact	
Organized Crime				
Landed Immigrant	Yes	Yes	Law, Fact and Balance	No right of review if "danger" or security certificate is issued
Other	Yes	Yes	Law and Fact	No right of review if "danger" or security certificate is issued
Act or Omission				
Landed Immigrant	Yes	Yes	Law, Fact and Balance	No right of review if "danger" or security certificate is issued
Other	Yes	Yes	Law and Fact	No right of review if "danger" or security certificate is issued
SECURITY				
Landed Immigrant	Yes	Yes	Law and Fact	No right of review if security certificate is issued
Other	Yes	Yes	Law and Fact	No right of review if security certificate is issued
MEDICAL				
Other only	Yes	No	–	
SYSTEM INTEGRITY				
Landed Immigrant	Yes	Yes	Law, Fact and Balance	
Other - Fact-based	Yes	No	–	e.g. previous deportation, no passport or visa, no status
Other - Judgement-based	Yes	Yes	Law and Fact	e.g. people smuggler, "non-genuine visitor"
FINANCIAL				
Landed Immigrant	Yes	Yes	Law, Fact and Balance	
Other	Yes	Yes	Law and Fact	

Chapter 10

Rethinking Discretion: Residual Powers

10.1 Discretion

Any use of discretion must be seen within the context of our proposed selection and protection systems. For example, our recommendations for the selection of economic immigrants entail a short series of objective criteria rather than a points test, and eliminate the occupational demand list. Hence, discretionary powers should not be required in this area.

But no system of selecting immigrants on such a large scale can possibly ensure that every single individual who might, in the long run, make a positive contribution will be selected. The goal is to ensure the overall quality of economic immigrants. Immigration in the context of the Self-supporting Class is not a right. Most of the requirements we have set are attainable by a person who is motivated to meet the standard. The fact that a particular applicant who does not meet these standards might in fact prove to be a good immigrant is *not* sufficient reason to develop a systematic reliance on discretionary decision making, which will inevitably lead to a decline in objectivity, efficiency, transparency and consistency.

In this chapter, we speak principally of those cases currently dealt with under "humanitarian and compassionate factors" as provided for in Section 114(2) of the current Act. This provision is so broad that Citizenship and Immigration Canada has attempted to write administrative guidelines on its usage. In practice, the provisions are far from transparent. They are used differently by different managers. Some managers will routinely use their powers under this section of the Act to permit overage dependants or an elderly parent to accompany an independent immigrant; others will do so only in very unusual circumstances. As we pointed out earlier, entire programs involving thousands of individuals have effectively been created under this broad and undefined umbrella. Some applicants will know of these practices, and will quite reasonably take advantage of them; others will not and be unwittingly penalized.

Our argument is not based on the fact that we do not believe in "discretion," or that we are insensitive to compassion. We believe that the system itself should be designed to operate in a compassionate manner, without having to rely on the emotional responses of individual officers. Compassion is a subjective reaction to the circumstances of another human being. What moves one person to tears may leave another unmoved, and both reactions might be perfectly legitimate.

Our approach to discretionary and humanitarian decision making is consistent with the values and principles that should inform the new Acts. The Acts should ensure that the rules are clear, and that they are administered in the same way for all applicants, regardless of race, creed, gender, religion — or their ability to please.

A number of the recommendations we have made in this report will markedly reduce the need for discretionary, humanitarian and compassionate decision-making authority. In terms of numbers, by far the most common use of the current humanitarian and compassionate provisions relates to permitting the spouses and dependent children of Canadians to apply for landed immigrant status from within the country. We have recommended in our discussion of the family that this administrative practice, which has become a *de facto* visa class, be regularized, publicized and facilitated. The State should be an instrument for reuniting spouses in genuine relationships rather than impeding this reunion. Our redefinition of "spouse" to include common-law and same-sex partners would render unnecessary several inconsistently applied and little-known administrative guidelines.

Our recommendations to exempt Tier One Family Class applicants from the excessive cost factor of medical admissibility, to offer protection of rights defined under international conventions in addition to the 1951 Convention on the Status of Refugees, and to process some individuals on student and temporary work status for landed immigrant status from within Canada, will make many current uses of humanitarian and discretionary powers unnecessary.

Our proposed Tier Three of the Family Class will enable the entry — under the clear responsibility of an enforceable sponsorship — of a number of other individuals who might otherwise "fall through the cracks" of program design and be obliged to seek "humanitarian" grounds, such as some *de facto* parents, non-dependent children, and siblings.

10.2 Extraordinary Measures

We believe that we have eliminated the majority of situations where recourse to humanitarian and compassionate provisions might be made. New types of situations will inevitably evolve as world circumstances and Canadian society change, and as the immigration industry adjusts to our new criteria. We propose the use of a limited number of extraordinary measures. They should be systematically analysed, and the legislation periodically revised to incorporate commonly encountered situations into program design. But, given that human circumstances are never fully predictable even in the short term, there will be a residue of cases that will require examination outside the provisions of all other programs.

We believe that a residual power should be created for carefully defined situations of serious dependency, to be used only at a very high level in the department. A second residual power would reside with the Minister for cases that are in the national interest and that have not been envisaged by any program. Such exceptional circumstances can be dealt with in a relatively transparent and consistent fashion.

Discretionary decisions would be of two distinct types: decisions made in Canada's national interest, and decisions that recognize relationships of substantial dependency with a citizen or resident of Canada deserving of recognition.

National interest decisions would be made after careful consideration of Canada's needs and its role in the world. Such cases would be rare. This type of decision should be authorized by the Minister and not delegated.

While the Minister's role in this regard might appear burdensome, the system we propose would eliminate the Minister's Permit. In practice, this more narrowly defined residual power could not be appealed to by the applicant, but rather, would be brought to the Minister's attention by departmental officials, the Minister's own staff, or other parties. This would involve far fewer cases and would also be more transparent and less onerous.

We would envisage this authority being used, for example, to allow the admission of persons otherwise inadmissible who were involved in peace talks sponsored by the Canadian government, the granting of permanent status to a renowned artist, athlete, humanitarian, or cultural figure otherwise unable to qualify, and other similar extraordinary circumstances.

Dependency decisions, which would recognize the close dependency ties of the person concerned to a citizen or resident of Canada, would be called for in instances where the person, while not falling within a class that would normally be processed for landing in Canada, would nevertheless be deserving of consideration.

In order to ensure consistency of decision making and to ensure that the residual power does not become an administrative convenience, we recommend that the residual power based on dependency be exercised at no level lower than that of director general.

Immigration authorized under this residual power is not a right. Canada's larger interests are not harmed if an otherwise acceptable applicant chooses not to immigrate to Canada because of family responsibilities towards, for example, an elderly parent or an adult child. Canadians with responsibilities for members of their own extended family make similarly difficult decisions every day in the contexts of employment, education, and place of residence.

This provision is intended only for use in those situations where a person completely dependent on a Canadian or a landed immigrant, or a Canadian completely dependent on a visa applicant, would suffer irreparable harm and continuing hardship if the applicant were not allowed to reside in Canada. Virtually all cases of the type of dependency we would wish to see included are already covered by the provisions of the Family Class. The persons concerned would normally have an approved sponsor but would be unable to meet some other requirement of the Act. Persons who have relationships with a Canadian resident as described in the Family Class but who do not have a sponsor, might be admitted by the director general if there is community support — a commitment of funds, not simply "moral support." Those persons who wish to accompany Self-supporting Class immigrants, but who do not meet the definition of spouse or dependent child, would not meet these criteria, although their subsequent admission might be possible under Tier Three of the Family Class.

RECOMMENDATION 168

The Immigration and Citizenship Act should provide for only two types of extraordinary powers to be exercised, at two different levels and not subject to delegation:

(i) measures taken in the national interest by the Minister of Citizenship and Immigration;

(ii) measures in a situation of dependency of a person on a Canadian citizen or landed immigrant, or vice versa, taken by the director general of the region concerned.

RECOMMENDATION 169

The annual report to Parliament should include a detailed summary of the use of residual powers. A list of each case in which the residual power was used by the Minister in the national interest should be included in a confidential annex distributed to Members of Parliament.

RECOMMENDATION 170

The Immigration and Citizenship Act should specify that the Minister and the regional director general do not have an obligation to consider whether to exercise the residual powers in the Act, nor to provide reasons for not considering, and that the decision is final.

RECOMMENDATION 171

Only individuals who meet the personal relationship criteria described in the Family Class, but who do not meet some other requirement of the Immigration and Citizenship Act or Regulations would be eligible to be considered for the use of the residual power based on complete dependency. In these cases, the residual power could be used to permit landing from within Canada, to grant landed immigrant status to overseas applicants or, in particular circumstances, to grant early admission.

RECOMMENDATION 172

The criteria for exercising the residual power based on dependency should include the demonstration of the real and subsisting emotional and/or financial dependency of the applicant on the prospective sponsor or vice versa; the dependency or inter-dependency should be of such a nature that failure to alleviate the situation would result in irreparable harm and continuing hardship.

Postscript

Now that we have come to the end of this report, we would like to say a few words about a number of conditions we consider essential to the implementation of our recommendations. Throughout the report, we have tried to be faithful to the values and principles we identified right from the start, and to the objectives of the two Acts we are proposing. To the extent that we have been successful in this, it will be more difficult for the department to implement a handful of recommendations taken here and there from the various chapters without threatening a certain overall cohesion in the system proposed in our report. We believe strongly enough in the power of ideas to take hope that a recommendation that seems impossible to implement today may eventually gain support and make its way into the legislation.

It will now be clear that implementation of the recommendations should be founded on better knowledge of reality and on sufficiently reliable databases. Every effort must be made to ensure that the collection and analysis of data and studies based on those data are encouraged and supported in the short, medium and long term.

Finally, we have placed a great deal of importance on the need for the department to act promptly, respecting the Charter and the legislation, when it becomes necessary to remove individuals from Canadian soil. This ability to act requires better allocation of human and financial resources and the development of efficient information systems in the enforcement field. Without these extra efforts, the best systems in the world will never be effective.

Annex 1

Terms of Reference

The current *Immigration Act* was developed following a program-wide policy review that occurred 20 years ago. Since the Act came into force in 1978, it has been amended more than 30 times to adapt it to a rapidly changing environment. This has resulted in legislation which is complex both for the public and for those who administer it.

The Immigration Legislative Review will examine the suitability of the immigration and refugee legislation to continue to provide the flexibility and direction needed to respond to emerging issues and migration trends in the 21st Century.

The Review is a logical next step for the immigration program in that it builds upon the broad direction for the future set by the 1994 Strategic Framework. This Framework was the result of a major public consultation exercise that touched upon many of the most important policy issues of the day. The Immigration Legislative Review will build upon the Strategic Framework by conducting a comprehensive study of current immigration and refugee legislation to ensure that it is an appropriate vehicle to take the program in the established direction. The Review will guide future legislative and policy adjustments and position us to better face the challenges of the 21st Century.

The Review will consist of a re-evaluation of current immigration and refugee legislation through review and analysis of Canadian social, economic and demographic trends and their implications;

- comparative review and analysis of other countries' experiences with immigration policy, including the results of their own research and reviews;
- conducting interviews of key partners; and
- developing a series of options and recommendations to strengthen the legislative framework for dealing with immigration and refugee matters.

The following outlines the structure and mandate for the Immigration Legislative Review Advisory Group.

Structure of the Advisory Group

The Advisory Group is composed of Susan Davis, Roslyn Kunin and Robert Trempe, who report to the Minister of Citizenship and Immigration. The members of the Group have been appointed until December 31, 1997. The group will be chaired by Mr. Trempe.

The Advisory Group is supported by a Secretariat located within the Department of Citizenship and Immigration. The Secretariat works under the direction of the Advisory Group in an administrative capacity to carry out the tasks and initiatives of the Review.

Mandate

Canada has a tradition of fair and generous immigration and refugee programs. Based on its review, the Advisory Group will provide a series of recommendations to guide and update future immigration and refugee legislation in a way that will maintain this tradition. The review will include, but is not restricted to:

- facilitating access by legitimate visitors and immigrants to Canada
- ensuring the integrity and efficiency of our refugee determination process
- treating people with dignity and respect, and ensuring that their cases are completed in a fair and expeditious manner
- enhancing the coherence of the process
- denying access to Canada by those who would abuse our generous system
- streamlining processes to improve client service
- studying the scope and depth of ministerial discretion and the framework whereby exceptions are made to regulatory processes.

The Advisory Group will submit its report with the options and recommendations it has developed to the Minister of Citizenship and Immigration by December 31, 1997.

Annex 2

Legislative Review Secretariat

Legislative Review Secretariat

Manager

Alain Théault

Special Advisors

Marie Bourry
Nabanita Giri
Dick Graham
Joan Howe-Gladish
Teresa Lamont
David Manicom
David Watt

Project Officer

Johanne Tassé-Swan

Briefing Coordinator

Maria Stajduhar

Office Support

Jacqueline Gingras-Bureau
Dyann Goyette
Dominique Groulx
Dionne O'Ree

Researcher

David Bhamjee

Editors

Ian Sadinsky
Jean-Pierre Fournier

Copy Editor

Monique Lacroix

Design/Typesetting

Thea Vandenberg
Danielle Claude

We would also like to thank:

Ellen Corkery-Dooher
Michael Finnerty
Yves Lafortune
Christine Mancarz
Ann Roberts
Tim Seburn
Margot Villeneuve
Reg Williams

Annex 3

Summary of Eligibility for In-Canada Processing for Landing

Summary of Eligibility for In-Canada Processing for Landing

	LRAG Proposals May apply in Canada?	Current Situation May apply in Canada?
VISITORS		
Tourists	**NO**	**NO**
Business Visitors	**NO**	**NO**
Students	**YES** (after graduation, with permanent job offer)	**NO***
Temporary Workers	**YES** (with permanent job offer)	**NO***
IMMIGRANTS		
Live-in Caregivers	**N/A**	**YES**
Convention Refugees	**YES**	**YES**
Other protected persons	**YES**	**N/A**
Dependants abroad of refugees	concurrent processing from abroad	concurrent processing from abroad
Dependants abroad of other protected persons	concurrent processing from abroad	**N/A**
Humanitarian Cases	**YES** (if residual powers criteria are met)	**YES**
Self-supporting (includes business and provincial nominees)	**NO**	**NO**
Family Class, Tier One (spouse, dependent children)	**YES**	Entry not facilitated, but routinely approved on humanitarian grounds if in Canada
Family Class, Tier Two (parents, fiancé(e)s)	**NO**	Entry not facilitated, but routinely approved on humanitarian grounds if in Canada
Family Class, Tier Three (others)	**NO**	**N/A**

* Applicants may be physically in Canada while their application is being processed abroad, often at a post in the United States.

Annex 4

Summary of Requirements: Self-supporting Class; Family Class

REQUIREMENTS	SELF-SUPPORTING CLASS (SSC)						FAMILY CLASS (FC)		
	SSC 1 Skilled Workers	SSC 2 Employer-designated	SSC 3 Entre-preneurs	SSC 4 Investors	Dependants of SSC 1-4	SSC 5 Provincial Nominees	FC 1 Spouse and Dependent Children	FC 2 Parents Fiancé(e)s	FC 3 Others
1. Official Language Skills[1]									
Proficiency	●	●	●	●					❍
Basic proficiency					❍		❍[2]	❍	
2. Education									
Complete secondary school meeting Canadian equivalency test									●
Qualification meeting Canadian equivalency test of 2 years full-time post-secondary study	●	●	●	●					
3. Age									
Must be between 21 and 45	●	❊	●						
4. Professional Experience or Financial Commitment									
2 years at high-skill level	●	❊							
2 years operating successful business; capital for start-up in Canada			●						
$500,000 financial commitment				●					
5. Settlement Arrangements:									
Immigrant must have liquid assets equal to 6 months LICO for family size; OR have sponsorship by community group having agreement with CIC/province	●		●	●		●			
3-year sponsorship. Sponsor must not have been on welfare during previous 12 months							●		
10-year sponsorship. Sponsor must meet LICO criteria								●	●

KEY

● must meet requirement ❊ valid job offer overcomes age criteria or work experience, but not both ❍ requirement may be offset by paying language-training fee

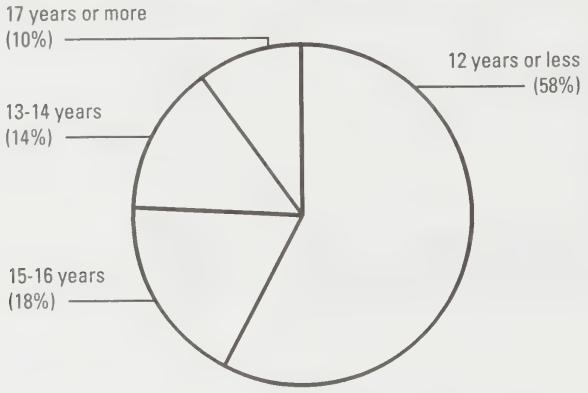
1. The terms used are intended to reflect labour market readiness ("proficiency") and a basic ability to function socially ("basic proficiency"), and are drawn from the Canadian language benchmarks developed by Citizenship and Immigration Canada.
2. Government loans would be available to assist in paying language fee for those demonstrating financial need (Family Class, Tier One only).

Annex 5

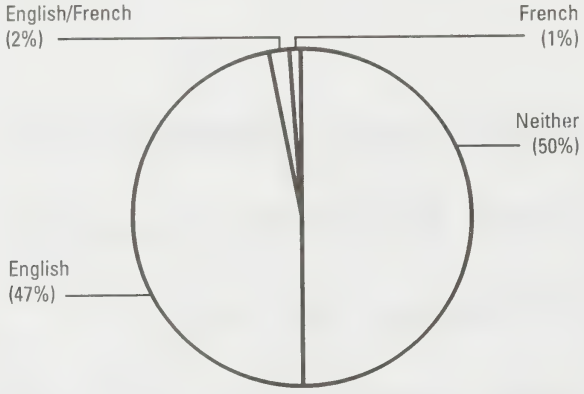
Entrepreneurs and Investors: Education, Language and Age Characteristics

Entrepreneurs: Education, Language and Age Characteristics (Landing Year, 1996)

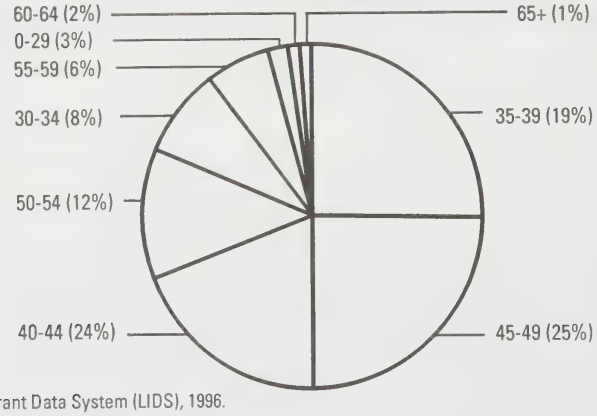
Years of Education



Language (as declared by immigrant)



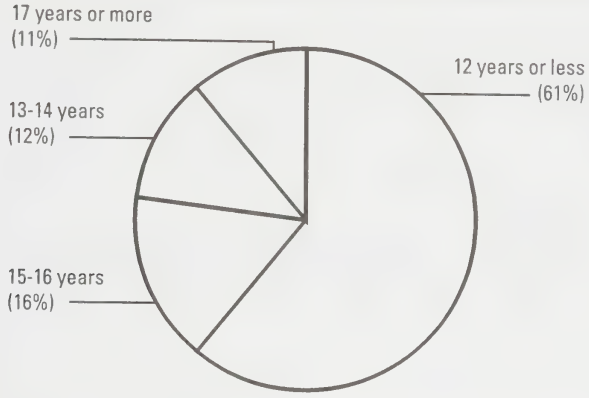
Age



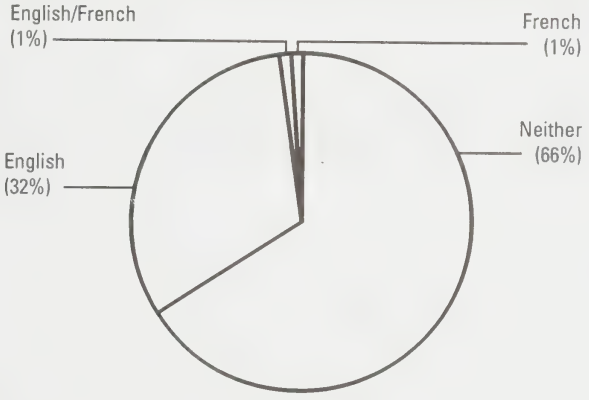
Source Data: Landed Immigrant Data System (LIDS), 1996.

Investors: Education, Language and Age Characteristics (Landing Year, 1996)

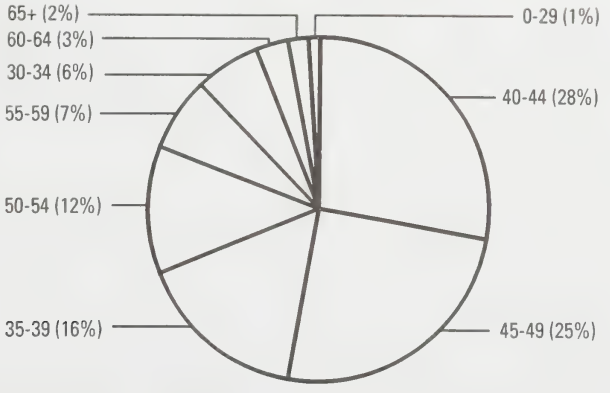
Years of Education



Language (as declared by immigrant)



Age



Source Data: Landed Immigrant Data System (LIDS), 1996.

Annex 6

Types of Status

Types of Status

Chapter		Provisional	Temporary	Temporary Protected	Landed Immigrant	Citizen
5	Early admission Tier 1 (Family)	X				
7	Persons awaiting protection or other decision in Canada	X				
8	Persons whose removal has been stayed	X				
8	Persons with a condition requiring medical surveillance who cannot provide an address	X				
6	Temporary workers		X			
6	Students		X			
6	Visitors		X			
7	Fast-track protection cases from abroad			X		
7	Persons granted protection in Canada and awaiting landing			X		
5	Family Class (Tier 1, Tier 2, Tier 3)				X	
6	Self-supporting Class (skilled workers, entrepreneurs, investors)				X	
7	Protection cases selected overseas who meet landing requirements				X	
7	Persons granted protection in Canada who meet landing requirements				X	
4	Landed immigrants who meet citizenship requirements and choose to become Canadian citizens					X

Bibliography

Introduction to the bibliography

The bibliography represents a list of the sources considered by the Legislative Review Advisory Group. A few points should be made concerning this bibliography.

First, this collection represents only those sources considered important to the writing of the report. A supplementary bibliography containing all available relevant information in the fields studied, separated by subject area, has also been submitted to the Minister. Second, this bibliography does not include the more than 500 submissions received, in confidence, by the Legislative Review Advisory Group. Third, the sheer volume of publications made it impossible to consult all sources. Lastly, the report has made use primarily of Canadian data and information. While numerous international studies exist, an attempt has been made, understandably, to make Canada and Canadian data the focal point of this report.

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